NAVAL WAR COLLEGE

International Law Situations

WITH SOLUTIONS AND NOTES

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PREFACE

"International Law Situations, with Solutions and Notes, 1938," has been prepared by Payson Sibley Wild, Jr., Ph. D., professor of international law, Harvard University, and associate for international law at the Naval War College. It covers problems which have been the subject of discussion by members of the senior and junior classes of 1939. The method followed has been to propound situations for consideration by members of the classes and, after critical discussion, to organize the material for publication.

While the conclusions reached as a result of the discussions are in no way official, the notes afford a convenient survey of material relating to the subject presented, and they should be of value for purposes of reference.

Criticism concerning the contents of this volume and suggestions regarding situations to be given consideration in subsequent volumes will be welcomed by the Naval War College.

C. P. SNYDER,
Rear Admiral, United States Navy,
President, Naval War College.

APRIL 6, 1939.

NOTE

Annually, since 1900, the Naval War College has published "International Law Situations, with Solutions and Notes." The volumes for the years 1901 to 1937, inclusive, were prepared by George Grafton Wilson, Ph.D., LL.D., professor emeritus of international law, Harvard University.

At the close of the College session, 1937–1938, Professor Wilson, at his own request, relinquished his duties as Associate for International Law, and was succeeded by Payson Sibley Wild, Jr., Ph.D., professor of international law, Harvard University.

Upon completion of Professor Wilson's address at the War College on April 4, 1939, the President of the College took occasion to recognize the valuable services of Professor Wilson, past and present, and to express to him the appreciation and esteem of the President and Officers of the Naval War College and of the Naval Service at large.

The Secretary of the Navy addressed a letter to Professor Wilson, expressing, on behalf of the many officers of the U. S. Navy who had enjoyed his association, their thanks for his valuable services, and extended his personal good wishes for the future.

CONTENTS

Situation I

BELLIGERENT AND NEUTRAL RIGHTS IN REGARD TO AIRCRAFT

States X and Y are at war. Other states are neutral. All states concerned are parties to the conventions relating to the conduct of aircraft as ratified by the Pan-American Conferences, and respect the generally accepted principles of international law.

(*a*) It is known that an aircraft, *B–17,* registered in state B, has carried to state X articles of the nature of contraband.

(*b*) It is known that an aircraft, *C–12,* registered in state C, has flown to a port O in state X above the line of vessels, submarines and aircraft, maintaining a blockade of port O.

(*c*) It is known that an aircraft, *D–20,* registered in state D, has carried in the regular air mail from port O to port N, an unblockaded port of state X, military messages, funds, and some light but essential military materials.

(*d*) It is known that an aircraft, *E–30,* registered in state E, has carried essential military materials to Forta, a town in state F near the frontier of state X, and that some of these materials were immediately shipped to state X.

(*e*) It is known that an aircraft, *G–40,* registered in state G, has under special charter carried General Xano of the Army of X from a port in state G to the military headquarters of state X.

These aircraft, severally, later, when above the high sea, are within an easy range of the guns of the *Y–2,* a military aircraft in state Y.

What may the *Y–2* lawfully do in each case?

SOLUTION

In each instance the *Y–2* may lawfully visit and search the neutral aircraft.

(*a*) The *B–17* should be released.

(*b*) If the *Y–2* is a member of the blockading squadron and if it meets the *C–12* while the latter is engaged on the return voyage, the *C–12* should be seized and held for prize court adjudication. If the *Y–2* encounters the *C–12* after the latter has completed the round trip journey, the *C–12* should be released. If the *Y–2* is not a member of the blockading squadron but meets the *C–12* while the latter is on the return trip, the *C–12* may be seized and held for prize court adjudication.

(*c*) The *D–20* should be released.

(*d*) The *E–30* should be released.

(*e*) If the *G–40* is no longer under special charter and if it has completed the journey for which it was hired, it should be released.

NOTES

Air law in general.—At the present time there are no binding conventional international law rules regulating the conduct of airplanes in war time. The need for effective law on this subject is great indeed, and it is to be hoped that the situation can be remedied in the near future. The use of airplanes in the Spanish Civil conflict and in the Sino-Japanese struggle has brought the law's gaps very vividly to public attention. Also the constant

menace and threat of air bombardment in a future war emphasizes the necessity for the development of international air law. Strictly speaking, therefore, since no binding rules exist, the *Y–2* might technically be permitted to do anything it pleased with the assorted neutral craft herein involved. The word "lawfully" will be construed, however, as implying the existence of legal principles, and the solutions will be reached in part by carrying over analogies from land and marine warfare into the air. As will be indicated later, the air weapon is *sui generis* in many respects, so that analogies are not always applicable, but they are none the less extremely useful in the formulation of the required rules.

Naval War College discussions.—The subject of air law has been considered previously in Naval War College situations, notably, in 1928, 1935, and 1936. As was stated in the 1936 situation:

> The introduction of aircraft as a means of warfare greatly modified the conduct of war upon the earth surface, on the water as well as on land. The earlier rules for warfare were concerned with surface combat. These rules could not in every instance be extended by analogy to aerial warfare, because the forms of warfare were not analogous. There was an attempt on the part of some writers to extend the three mile maritime jurisdiction doctrine to the superjacent air. In this attempt the early recognition of the fact that the law of gravity did not act horizontally and vertically in the same manner, destroyed the analogy. Differences in speed and in other respects introduced other complications in attempts to extend maritime and land rules to the air. Aircraft were coming more and more to be used in war; therefore, rules had to be devised. The World War experiences and problems contributed valuable basal data for the determination of the nature of possible regulation of use of aircraft. The equipment of aircraft with radio introduced other problems. (International Law Situations, 1936, p. 39.)

Can legal restraints on air warfare be made?—The feeling has been prevalent in some quarters that efforts to curb the use of aircraft in war are doomed to failure because this new weapon is so powerful that no belligerent would be willing to restrict the employment of this military arm. The devastation and destruction which airplanes may bring about, so the argument runs, will be so effective in bringing the opponent to terms that hereafter the sanctions for restraint will no longer be operative. Further, the possibilities of "totalitarian" wars between rival ideological groups makes it appear to some people that curbs would be of no value. This hypothesis that ruthlessness will "pay" and that legal restrictions will be footless, deserves examination.

The arguments in favor of putting restraints on the use of aircraft may be summed up as follows:

1. In the past, devastation has always been illegal when it has not been of military advantage. It has not profited a belligerent to destroy more life and property than he needs for the attainment of his military objective, namely, the subjection of the enemy. If a belligerent wins a verdict over a still prosperous foe, he is the richer and derives more benefit than if he had defeated a starved and exhausted enemy.

There must be some reasonably close connection between the destruction of property and the overcoming of the enemy's army. (Manual, Rules of Land Warfare, 1914, Section 334.)

The object of war in the military sense is to procure the complete submission of the enemy at the earliest possible period with the least possible expenditure of men and money. (Wilson and Tucker, International Law, 9th Edition, p. 250.)

2. It is also always been held that it is to the advantage of all belligerents not to lapse into barbarism.

The advantage of having and of maintaining a regime under which the more gross and calamitous varieties of Schrecklichkeit are banned, will be apparent to the man on the street—who will be himself affected—and, one hopes, even to the most militarist governments. (J. M. Spaight, Airpower and War Rights, Second Edition, 1933, p. 29.)

3. There has usually been also a certain amount of natural chivalry and humanitarianism in warfare. These have underlain many of the war rules, the assumption being that there are certain things which human beings will not do to one another even in the heat of strife.

Airships frequently returned from their expeditions with their full complement of bombs, because they have not been able to make out certain targets with sufficient accuracy. It would have been easy enough for them before returning to get rid of their bombs and drop them on any place over which they happened to fly, if they wanted to kill harmless citizens. (Spaight, op. cit., p. 14.)

4. Another sanction for the laws of war has been the fear of retaliation. Restraint upon a belligerent has thus often been imposed by a dread of reprisals. Though these latter have never been successfully regulated by law, they have operated as a deterrent to lawless action.

5. In the case of air warfare it has often been contended that indiscriminate bombing only stiffens the resistance of the enemy population, and that ruthlessness, therefore, carries with it its own sanction. If this were so universally there would be no military advantage in wholesale air bombardment of crowded cities and innocent populations.

The sanctions for the laws of war have thus rested upon common sense and practical considerations. Rules and conventions which stray far from the realities of belligerent strife become fruitless moral injunctions, but ethics and military necessities frequently combine, as above shown, into imposing, sensible restraints upon a belligerent.

Air warfare and the sanctions of the laws of war.—As previously indicated, the belief is current among various groups that the customary sanctions do not and cannot operate where air combat is concerned. These arguments may be summarized as follows:

1. Contrary to the thesis that ruthless bombardment merely increases a nation's will to resist, is the view that devastation may in time weaken the morale of a belligerent state. The bombardments of Barcelona of March 1938, and the use of gas from the air by the Italians in Ethiopia are cited as examples of the way in which war from the sky can undermine the fighting spirit. The nerve-racking tension, the sleepless nights, the perpetual sense of insecurity, the nightmare of sudden death in one's own home or in those of friends and relatives, act as corrosives upon the iron will and tend to make a people wonder whether the ideals for which they think they are fighting are worth this holocaust and carnage.

It is not altogether true that the bombing of England had no moral effect for by moral effect is not meant only a sudden, craven desire to surrender; and secondly, that air attacks on the large centers of populations were merely side shows in 1915–18, whereas in the next war they will be a primary operation * * *. No doubt on the whole, London took the air raids with dignity and composure, but no

one who is acquainted with the facts can admit that the people who left London to crowd into Maidenhead, Manchester, Brighton, and other safer towns, were exclusively "Jews and Aliens." (Spaight, op. cit., pp. 8 and 9.)

2. On the grounds of military necessity it is denied by many that there is no military advantage in bombing food supplies, communication centers, crops and civilian homes. This is to say that the line between military requirements and useless civilian damage can no longer be drawn. Wide scale air operations dealing death indiscriminately, and paralyzing normal civilian operations, may have a definite military objective, in that the war may be shortened. This line of reasoning is allied to the discussion above about civilian morale because whatever tends to cause civilian resistance to crumble may be regarded as having a military objective. This of course is broadening the concept of military necessity in a fashion seldom previously tolerated. The effectiveness of the airplane, however, is so great and its potentialities for dealing deadly blows are so vast that it is said that air bombardments cannot be compared to the "unnecessary" damage committed by land and sea forces where the destruction is relatively so insignificant that it really does not "pay" and only causes useless loss unconnected with any genuine weakening of morale and resistance.

If * * * some but not an excessive loss of life can be shown to be involved in operations which will enormously abbreviate the periods of wars and will reduce to a comparatively trivial total the casualty lists and the huge but incalculable sum of indirect losses consequent upon hostilities, it could be argued that humanity will gain and not lose from the recognition of the legitimacy of the new method. (Spaight, op. cit., p. 81.)

3. As for chivalry, it is said that when ideologies clash the usual humanitarian feelings will be submerged. How, runs the query, can a Fascist and a Communist be expected to deal like gentlemen with one another when the only obligation which they feel is that of exterminating one another. As Spaight says "Condemnation or approval of any given bombardment will tend to vary with the ideological bias of the commentator upon it". (The 19th Century, Sept. 1938. Vol. 124, No. 739.)

4. When it comes to retaliation as a sanction, those opposing the attempt to regulate air warfare declare that if an air-minded belligerent is quick enough and ruthless enough, he can give the enemy such a blow at the outset that there will be no possibility for retaliation. Reprisals are a sanction only if the other side has the physical strength to threaten them. Therefore, a belligerent which has overwhelming supremacy in the air, and which can lay waste his opponent, need fear no retaliation and can hope for a speedy victory. These are the thoughts and dreams of those proposing the "War of Terror" which has the support of some strategists in some countries.

Despite the cogency of some of these arguments, it is still worth attempting to elaborate some rules. The unrestricted war of the skies has many devotees and their plea for a relaxation of the customary restraints has a certain plausibility, but it cannot be presumed without more experience and evidence that air warfare will be exempt from the sanctions which land and sea combatants have always encountered. To date, the existence of rules has been found to be of advantage. Upon that basis the effort to formulate a practical code

of the air should go forward, the drafters always bearing in mind the special nature of aircraft and the need for practical considerations. Even if a code between belligerents seems of dubious efficacy, there would be an obvious improvement in the relations between belligerents and neutrals if law on this topic were developed. A belligerent may well fear *neutral* retaliation, if not that of his opponent, and there would be a gain to all states through the making of effective regulations.

Actual and projected conventions and rules for the air.—The first rule concerning air warfare was drafted at the First Hague Peace Conference in 1899. That convention prohibited the discharge of projectiles from balloons for a period of 5 years. Before the convening of the second Hague conference in 1907, many states saw some of the possibilities of air warfare, and were therefore unwilling to renew their adherence to the 1899 convention. The only other pre-war regulation of air combat is found in Article 25 of Convention IV, Respecting the Laws and Customs of War on Land, which stipulated that "The attack or bombardment, *by whatever means,* of towns, villages, habitations, or buildings which are not defended, is prohibited." Much dispute has raged as to whether this article, being a part of a land convention, covers the air, though the words "whatever means" would seem to be rather comprehensive. The debate as to the intent of this regulation seems rather futile in any event, because only undefended places are immune, and it is never hard for belligerents to discover that a particular place which they wish to bombard is actually "defended."

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This same problem as to what is defended and what is not, arose in connection with Article I of Hague Convention IX concerning naval bombardment. During the world war, therefore, there was little effective legal regulation of air warfare which increased in magnitude and importance so tremendously at that time.

There was uncertainty before 1914 also as to jurisdiction over the air, some contending that the air above a certain height should be free, each subjacent state having an air belt comparable to marginal seas. The regulations of neutrals during the war and the experiences of that conflict gave impetus to the formulation of the present rule that each subjacent state has complete jurisdiction over all the air space above it. The absurdity of an air belt in the light of the laws of physics which decree that an object dropped from a great height will hit harder than an object dropped nearer the ground soon became manifest and post-war conventions and drafts have recognized each state's jurisdiction up to the heavens.

Post-war conventions and proposals.—A number of treaties have been made since the war which lay down rules for aircraft in peace time. The first of these was the Convention on the Regulation of Aerial Navigation of 1919 which states in Article I:

> The high contracting parties recognize that every power has complete and exclusive sovereignty over the air space above its territory.

Another noteworthy convention was that made in Habana in 1928 on Commercial Aviation, and though its provisions are not designed for war, the following articles are relevant to this discussion:

ARTICLE 3. The following shall be deemed to be state air craft:

(*a*) Military and Naval aircraft.

(*b*) Aircraft exclusively employed in state service, such as posts, customs, police.

Every other aircraft shall be deemed to be a private aircraft.

All state aircraft other than military, naval, customs, and police aircraft shall be treated as private aircraft and as such shall be subject to all the provisions of the present convention.

Following the Washington Limitation of Arms Conference of 1922 a commission of jurists met at The Hague and drafted a convention on air warfare. In this convention the criterion of defended or undefended was abandoned, and air bombardment was regulated in terms of objectives. The framers of these rules definitely prohibited indiscriminate bombardment, and endeavored to furnish a precise definition of the objectives which alone may be attacked. The following articles of this draft are the ones most relevant to this discussion:

ARTICLE 6. (1) The transmission by radio by a vessel or an aircraft, whether enemy or neutral, when on or over the high seas of military intelligence for the immediate use of a belligerent is to be deemed a hostile act and will render the vessel or aircraft liable to be fired upon.

(2) A neutral vessel or neutral aircraft which transmits when on or over the high seas information destined for a belligerent concerning military operations or military forces shall be liable to capture. The Prize Court may condemn the vessel or aircraft if it considers that the circumstances justify condemnation.

(3) Liability to capture of a neutral vessel or aircraft on account of the acts referred to in paragraphs (1) and (2) is not extinguished by the conclusion of the voyage or flight on which the vessel or aircraft was engaged at the time, but shall subsist for a period of one year after the act complained of.

ARTICLE 30. In case a belligerent commanding officer considers that the presence of aircraft is likely to prejudice the success of the operations in which he is engaged at the moment, he may prohibit the passing of neutral aircraft in the immediate vicinity of his forces or may oblige them to follow a particular route. A neutral aircraft which does not conform to such directions, of which he has had notice issued by the belligerent commanding officer, may be fired upon.

ARTICLE 37. Members of the crew of a neutral aircraft which has been detained by a belligerent shall be released unconditionally, if they are neutral nationals and not in the service of the enemy. If they are enemy nationals or in the service of the enemy, they may be made prisoners of war.

Passengers are entitled to be released unless they are in the service of the enemy or are enemy nationals fit for military service, in which cases they may be made prisoners of war.

Release may in any case be delayed if the military interests of the belligerent so require.

The belligerent may hold as prisoners of war any member of the crew or any passenger whose service in a flight at the close of which he has been captured has been of special and active assistance to the enemy.

ARTICLE 49. Private aircraft are liable to visit and search and to capture by belligerent military aircraft.

ARTICLE 50. Belligerent military aircraft have the right to order public non-military and private aircraft to alight in or proceed for visit and search to a suitable locality reasonably accessible.

Refusal, after warning, to obey such orders to alight or to proceed to such a locality for examination exposes an aircraft to the risk of being fired upon.

ARTICLE 53. A neutral private aircraft is liable to capture if it—

(*a*) Resists the legitimate exercise of belligerent rights.

(*b*) Violates a prohibition of which it has had notice issued by a belligerent commanding officer under article 30.

(*c*) Is engaged in unneutral service.

(*d*) Is armed in time of war when outside the jurisdiction of its own country.

(*e*) Has no external marks or uses false marks.

(*f*) Has no papers or insufficient or irregular papers.

(*g*) Is manifestly out of the line between the point of departure and the point of destination indicated in its papers and after such enquiries as the belligerent may deem necessary, no good cause is shown for the deviation. The aircraft, together with its crew and passengers, if any, may be detained by the belligerent, pending such enquiries.

(*h*) Carries, or itself constitutes, contraband of war.

(*i*) Is engaged in breach of a blockade duly established and effectively maintained.

(*k*) Has been transferred from belligerent to neutral nationality at a date and in circumstances indicating an intention of evading the consequences to which an enemy aircraft, as such, is exposed.

Provided, That in each case (except (*k*)) the ground for capture shall be an act carried out in the flight in which the neutral aircraft came into belligerent hands, i. e., since it left its point of departure and before it reached its point of destination.

ARTICLE 56. A private aircraft captured upon the ground that it has no external marks or is using false marks, or that it is armed in time of war outside the jurisdiction of its own country, is liable to condemnation.

A neutral private aircraft captured upon the ground that it has disregarded the direction of a belligerent commanding officer under article 30 is liable to condemnation, unless it can justify its presence within the prohibited zone.

In all other cases, the prize court in adjudicating upon any case of capture of an aircraft or its cargo, or of postal correspondence on board an aircraft, shall apply the same rules as would be applied to a merchant vessel or its cargo or to postal correspondence on board a merchant vessel.

ARTICLE 58. Private aircraft which are found upon visit and search to be neutral aircraft liable to condemnation upon the ground of unneutral service, or upon the ground that they have no external marks or are bearing false marks, may be destroyed, if sending them in for adjudication would be

impossible or would imperil the safety of the belligerent aircraft or the success of the operations in which it is engaged. Apart from the cases mentioned above, a neutral private aircraft must not be destroyed except in the gravest military emergency, which would not justify the officer in command in releasing it or sending it in for adjudication.

This last article is similar to Article 49 of the Declaration of London which is as follows:

As an exception a neutral vessel captured by a belligerent ship and which would be liable to condemnation, may be destroyed if the observance of Article 48 would involve danger to the ship of war or to the success of the operation in which she is at the time engaged.

In all these proposals for dealing with aircraft the rules are either analogies or adaptations of analogies drawn from the generally accepted rules of naval and land warfare. Do these analogies hold? Should special rights be conferred upon airplanes? The answer frequently given is to the effect that special weaknesses or special ability do not bring special immunities or special privileges, and that new weapons must adapt themselves to the already accepted rules. Some modifications, however, are in order. Manifestly visit and search of an airplane by an airplane is quite different from a similar process on the surface. Deviation in certain circumstances must therefore be allowed, and in general, the fact that airplanes operate in a three dimensional realm, means that old regulations must take cognizance of the new physical problems.

Preliminary Harvard draft code.—Recently, research in international law under the auspices of the Harvard Law School has been made concerning rights and duties of neutral states in naval and aerial war. Though the research draft is not official, the following article, No. 111, gives an indica-

tion of the trend in adapting established principles to the needs of the new agency:

(1) A belligerent commissioned military aircraft may signal a merchant vessel to stop as by radio or by firing a machine gun burst across its bows.

(2) If sea conditions permit the aircraft to alight, the aircraft shall alight and the procedure applicable to surface vessels shall be followed.

(3) If the belligerent aircraft is unable to alight, it may require the vessel to proceed on its course under instructions as to speed until the sea moderates or until a naval vessel of the belligerent appears; if visit and search are not effected by either means within six hours, or if the aircraft does not remain within sight or hearing of the merchant vessel, the vessel may resume its course at normal speed.

(4) If the vessel when summoned does not stop, attempts to escape, resists visit and search, or does not proceed according to instructions, it may be compelled by force to stop and the belligerent shall not be responsible for resulting injury to life or property.

Assumptions in this case.—In arriving at the solutions of the problems presented, it has been assumed that the neutral plane in each case is either a private plane or is to be treated as such. (See Art. III of Habana Convention op. cit.) It is further assumed that the papers of these planes are in order, that the craft are plainly marked, that it has been possible to signal understandably for visit and search, that all parties have agreed upon the definition of contraband, that an effective blockade is being maintained, that the neutrals knew of the blockade, and that the planes were all unarmed. It is therefore possible now to leave the general considerations and to take up the specific issues raised in this situation.

Visit and search by airplanes.—It is agreed in principle that belligerent airplanes have the right

to visit and search not only neutral surface vessels but also neutral aircraft. Agreement upon the *application* of the principle in actual practice is difficult to achieve, divergent views having been propounded in various quarters at different times. At the meeting of the jurists at The Hague in 1923 the delegations were not in harmony on this point of the visit and search of surface craft. The Dutch representatives particularly were apprehensive lest the employment of aircraft involve the right of deviation. The jurists had to content themselves in Article 49 with the simple statement that "Private aircraft are liable to visit and search and to capture by belligerent military aircraft." The technique by which this was to be accomplished was not agreed upon. As the comment in the proposed draft says:

> No article on the subject of the exercise by belligerent military aircraft of the right of visit and search of merchant vessels has secured the votes of a majority of the Delegations, and therefore no article on the subject is included in the code of rules. Nevertheless, all the Delegations are impressed with the necessity of surrounding with proper safeguards the use of aircraft against merchant vessels. Otherwise excesses analogous to those which took place during the recent war might be reproduced in future wars.
>
> The reason why no agreed text has been adopted by the Commission is due to divergence of view as to what action an aircraft should be permitted to take against a merchant vessel.
>
> The aircraft in use today are light and fragile things. Except in favourable circumstances they would not be able to alight on the water and send a man on board a merchant vessel at the spot where the merchant vessel is first encountered (*visite sur place*). To make the right of visit and search by an aircraft effective it would usually be nec-

essary to direct the merchant vessels to come to some convenient locality where the aircraft can alight and send men on board for the purpose. This would imply a right on the part of the belligerent military aircraft to compel the merchant vessel to deviate from her course before it was in possession of any proofs derived from an examination of the ship herself and her papers that there were circumstances of suspicion which justified such interference with neutral trade. If the deviation which the merchant vessel was obliged to make was prolonged, as might be the case if the aircraft was operating far from land, the losses and inconvenience imposed on neutral shipping would be very heavy.

Is or is not a warship entitled to oblige a merchant vessel to deviate from her course for the purpose of enabling the right of visit and search to be carried out? Would an aircraft be exercising its rights in conformity with the rules to which surface warships are subject if it obliged a merchant vessel to deviate from her course in this way? Even if a warship is entitled on occasion to oblige a merchant vessel to deviate from her course before visiting her, can a similar right be recognised for military aircraft without opening the door to very great abuses?

These are the questions upon which the views entertained by the Delegations differed appreciably, and indicate the reasons why it was not found possible to devise any text on which all parties could agree.

With regard to visit and search of aircraft by aircraft, however, it was conceded by all parties, as recorded in Article 50, that the special nature of the craft made deviation imperative. Two airplanes simply cannot hover in mid-air while one of them attempts to inspect the other. The laws of gravity demand a change in the laws of nations. Thus it is permitted to a belligerent airplane to order the neutral craft to alight in or proceed to "a suitable locality reasonably accessible" for visit and search. The principle of the right of deviation is thus established.

Problems of signalling and of landing.—According to the general rule, the belligerent plane must signal the neutral plane and then ask it to alight. It is upon this question as to the method of signalling that international agreement is necessary. Should the belligerent plane be expected to maneuvre into a position from which it can fire a shot across the propeller (bow) of the neutral plane? Some authorities on air matters maintain that the pilot of a neutral plane would not be able to know when such a shot had been fired and that he would be informed of the order to land only if the shot actually hit his plane. In such a case, aircraft being more fragile and delicate than surface vessels, the damage committed might be out of all proportion to the military needs. For this reason it is frequently suggested that summons by shot is impractical and unjustifiable, and that communication or summons must be made in some other fashion, probably by radio.

A radio summons would be satisfactory if there were international agreement standardizing airplane radios and airplane signals. At the present time there is such uniformity among surface vessels' radio equipment which are tuned in frequently to a particular wave length for the reception of distress signals. In the air, however, no belligerent plane now could be certain that a neutral airplane was equipped to receive a radio summons. Misunderstanding and confusion can be eliminated only by the adoption of an international code on this matter. Assuming that this difficulty has been overcome, other problems arise. If the belligerent is certain that the neutral plane has under-

stood the summons and is deliberately not heeding it, is it justified in using force to bring the neutral plane to? On the surface such a right to the exercise of sufficient force to carry out a summons to halt exists, but this right may be exercised without necessarily destroying or damaging seriously the fleeing ship.

In the air, however, the frailty of the neutral plane may be such that any shot capable of bringing it to, might also destroy it. Some experts, therefore, would deny the belligerent the right to use force in this instance, contending that the safety of the passengers and personnel of the plane ought not to be put in jeopardy merely because of a refusal to land for purposes of visit. This, however, would constitute a serious restriction upon belligerent rights, a restraint which in practice indubitably would be unacceptable. Provided an accurate means for summoning can be agreed upon, it does not seem unreasonable to hold a neutral plane liable to the consequences of its own refusal to heed a legitimate summons even though those consequences be of the most serious sort. If the neutral plane in such circumstances is destroyed with complete loss of the lives and property on board, it was the fault of the neutral who took the risk, not the responsibility of the belligerent.

Other questions deserve attention. Suppose the neutral plane is encountered over the high seas and cannot alight upon the water? Suppose the weather is so bad that a sudden landing would be extremely perilous? Suppose the neutral plane does not have sufficient fuel to enable it to deviate and still reach its original destination? What is the meaning of

"unreasonably accessible"? The preliminary Harvard draft code, previously cited, attempts to answer these queries. Some such standard conventional arrangement is indeed an immediate need if there is to be any satisfactory regulation of air law. In all probability the belligerent will have to be accommodating in regard to supplying extra fuel if the need occurs, and will have to recognize weather conditions and the suitability of landing arrangements, with surface craft cooperating in the visit and search effort as suggested in the Harvard code. As to "reasonable accessibility" a radius of 50 miles seems a feasible limit for deviation at the present time. Future prize court interpretations of the word "reasonable" will help to evolve a satisfactory set of rulings on this as yet undetermined matter.

Attack on Chinese commercial airplane.—One of the first incidents involving an encounter between a military and a commercial plane was that which occurred in August 1938 near Macao in China. Although technically in this case there was no war and although visit of a neutral plane was not involved, the case sets an interesting precedent. Particularly to be noted is the Japanese contention that the commercial plane was not clearly marked. The fact that military and commercial aircraft ordinarily are not easily distinguishable is an important one for international law. If confusion is to be avoided, agreement must be reached upon the proper marking of nonmilitary planes. Otherwise "regrettable incidents" will continue to occur.

Text of a note presented to the Japanese Foreign Office by the American Ambassador at Tokyo, upon instruction of the Secretary of State:

AUGUST 26, 1938.

EXCELLENCY:

Acting under instructions, I have the honor on behalf of my Government to protest to Your Excellency against the unwarranted attack on August 24, 1938, near Macao, by Japanese airplanes upon a commercial airplane operated by the China National Aviation Corporation resulting in the total destruction of the commercial airplane, the loss of the lives of a number of noncombatant passengers, and the endangering of the life of the American pilot.

This attack upon the plane has aroused public feeling in the United States.

I am directed to point out to Your Excellency, with reference to the attack in question, that not only was the life of an American national directly imperilled but loss was also occasioned to American property interests as the Pan American Airways has a very substantial interest in the China National Aviation Corporation.

I am directed to invite the special attention of Your Excellency to the following points in the account of Pilot Wood: the China National Aviation Corporation plane was pursued by Japanese planes which started machine gunning; after the China National Aviation Corporation plane had successfully landed it was followed down by Japanese pursuit planes which continued to machine gun it until it had sunk; and when Pilot Wood started swimming across the river he was followed by one of the Japanese planes which continued to machine gun him.

My Government desires to express its emphatic objection to the jeopardizing in this way of the lives of American as well as other noncombatant occupants of unarmed civilian planes engaged in clearly recognized and established commercial services over a regularly scheduled air route.

I avail myself (etc.)

JOSEPH C. GREW.

(Press Releases, Vol. XIX, No. 465, pp. 146–147.)

Following is the text of the Japanese note, handed to United States Ambassador Joseph C. Grew tonight, replying to the American protest of August 26 against the destruction of a Chinese-American airliner near Canton August 24 (Tokyo, Aug. 31):

MONSIEUR L'AMBASSADEUR:

I have the honor to acknowledge Your Excellency's note of August 26 stating Your Excellency's protest under instructions and on behalf of the American Government against an unwarranted attack August 24 near Macao by Japanese airplanes upon a commercial airplane of the China National Aviation Corporation resulting in the total destruction of said Chinese plane and the loss of the lives of a number of its passengers and endangering the life of its American pilot.

The incident was caused by the C. N. A. C. plane which, within the Japanese field of operations, acted in such a manner as invited suspicions of its being a Chinese military craft, as stated in the following report, and which was consequently pursued and attacked by our naval planes in the belief that it was an enemy plane.

While it is to be regretted that this resulted in endangering the life of an American citizen who happened to be the pilot of the plane, as well as the death or wounding of noncombatant passengers and crew, the Japanese Government hold the view that the action of their naval planes was not unwarranted in the light of the above-mentioned circumstance.

It is also their opinion that the company to which the aircraft in question belonged being a Chinese juridical person, the incident is not one which involves Japan directly with any third power.

However, I desire to add that because of the wide discrepancies between the pilot's accounts, as given in Your Excellency's note, and reports in the hands of the Japanese Government, further investigations were instituted and the following new report has been received, which substantially confirms what Mr. Horinouchi (Vice Minister for Foreign

Affairs) on the occasion of Your Excellency's visit on the 26th stated on the basis of information then available.

I avail myself of this opportunity to renew to Your Excellency assurances of my highest consideration.

REPORT

On the morning of the 24th instant five Japanese naval airplanes, proceeding in the direction of the Canton-Hankow railway, unexpectedly sighted over Chiautao Island, at 9:30 a. m., a large-type land plane, bearing no distinguishing mark, some 2,000 meters away to the north, which was flying toward the west at an altitude of about 2,000 meters, and attempted to approach the plane for the purpose of identification.

The large plane in question, as soon as it discovered our naval planes approaching, abruptly turned in a northwesterly direction and took flight at full speed, hiding itself in the clouds. The approaching movement of the naval planes were made for the purpose of ascertaining the nature of the land plane.

However, seeing the plane flee from them, our air squadron concluded in the light of their past experiences that it was an enemy plane which came either to attack our warships or to make reconnaisance and accordingly took an offensive position by placing two planes above and three planes below the clouds. Soon after, our planes lying in wait below the clouds, discovering the supposedly enemy plane, pursued and attacked it.

The plane continued to flee by taking advantage of scattered clouds, but was hard pressed by our squadron and finally landed in the river on the south side of the delta which lies sixteen kilometers west of Hungmenchikow. From the time they first sighted the plane until the moment it landed our planes were situated directly behind it for most of the time, so that it was difficult to ascertain its character, and our planes were throughout in the belief that the land plane was an enemy craft.

As soon as the latter landed, however, our planes descended in order to inspect the spot. When they reached a point above the land plane where they could better distinguish the type of plane, a doubt arose as to its exact type.

Our planes therefore immediately stopped their attack. As stated above, there was some time, though very brief, after the landing of the said plane until doubt came to be entertained as to its nature, and during that brief period there were some among our craft which continued the attack, but there was absolutely no more shooting thereafter.

Our naval planes then dived to twenty meters above the water and inspected the landed plane, whereupon the plane in question was found to be an all-metal Douglas passenger plane with no painted mark except a Chinese character signifying "mail" marked on the upper face of its right wing and on the right side of its body. Our planes left without firing. Our planes saw on the landed plane the pilot and also a few passengers near the entrance of the passenger compartment in the rear, but they thought as the spot was close to the bank of the river these men would reach the shore (Press Releases, Vol. XIX, No. 466, pp. 156–158.)

Sending in to a prize court.—If, in the present case, visit and search of the neutral planes yields evidence of guilt, the craft should be sent in for prize court adjudication. It must be remembered that search is not an inquisition, that there must be legal grounds for holding the plane, that mere suspicion is not enough, and that visit and search are an enquiry, not a prosecution.

Whereas, according to the principles universally acknowledged, a belligerent ship of war has, as a general rule and except for special circumstances, the right to stop in the open sea a neutral commercial vessel and to proceed to visit and search it to assure himself whether it is observing the rules of neutrality, especially as to contraband;

Whereas, on the other hand, as the legality of every act going beyond the limits of visit and search depends upon the existence either of contraband trade or of sufficient reasons to believe that there is such,

as, in this respect, it is necessary to confine oneself *to reasons of a juridical nature;* * * *

as the information possessed by the Italian authorities was of too general a nature and had too little connection with

the aeroplane in question to constitute sufficient juridical reasons to believe in any hostile destination whatever and, consequently, to justify the capture of the vessel which was transporting the aeroplane. (The Carthage, G. G. Wilson, The Hague Arbitration Cases, p. 365.)

Airplanes and contraband.—The Jurists' Code envisages the seizure of neutral planes on the ground of carrying contraband (Art. 53, Sec. i). Undoubtedly in any future war belligerents will attempt to intercept contraband commerce by air as they have by sea, though special schemes for certification of neutral airships like one outlined in the preliminary Harvard Code may go into effect and so obviate the usual contraband rules. The problem of what constitutes contraband is not one that needs to be resolved here. Possibly every article will be contraband, or perhaps the concept will disappear entirely with neutrals and belligerents agreeing instead upon some sort of certificate system. In this instance, if the *B–17* were intercepted while actually carrying contraband, the plane would be liable to seizure. The air code is thus more severe than the surface law rules, for according to the jurists' plan, the vessel is liable merely for the carriage of contraband while surface merchant ships are not similarly liable unless some connection between the ownership of the vessel and that of the goods can be established. That is, if the ship's owners can be presumed to know that the ship is carrying contraband, the ship may then be seized. According to the Declaration of London presumption of such knowledge exists if—

(Article 40). * * * The contraband forms, either by value, by weight, by volume, or by freight, more than half the cargo.

The penalty for the carriage of contraband, however, terminates with the deposit of the goods. As the Jurist's Code states in Article 53:

> The ground for capture shall be an act carried out in the flight in which the neutral aircraft came into belligerent hands, i. e., since it left its point of departure and before it reached its point of destination.

The rule is the same for surface ships.

> A capture is not to be made on the ground of a carriage of contraband previously accomplished and at the time completed. (Declaration of London, Art. 38.)
>
> A vessel's liability to seizure for the carriage of contraband usually terminates with the deposit of the contraband cargo, unless the voyage has been accomplished by means of false or simulated papers. (Evans, Cases on International Law, pp. 700, 701 ff.)

Since the *B–17* is encountered "later," that is, presumably *after* it has completed the carriage of the contraband, it should be released by the *Y–2,* which should make a record of the visit and search in the *B–17's* log.

Should the air law be more rigorous?—The suggestion has been made that the application of the regular maritime rules by analogy to the air is unsatisfactory. The argument runs that since an airplane travels so much faster than a surface ship, and since it is capable of making so many more voyages, the penalty should be more severe. The greater effectiveness of the plane for the carriage of goods should make for an extension of the liability, according to this view. Also, it is said that because of the greater difficulty of intercepting aircraft, the penalty when they are caught should be correspondingly more stringent. The law in the future may move in this direction, but to date it

has not, and the solution must be reached on the basis of the established practice in maritime cases.

Airplanes and blockade.—There has not yet been in practice any attempt to maintain a blockade by airplanes but all discussions on the laws of warfare assume that such a blockade may some day be tried. The jurists in 1923 in Article 53 assumed such a contingency and gave a belligerent the right to seize on the grounds of violation of blockade. Students of the problem are in accord on the point that a blockade maintained by airplanes alone would be neither feasible nor possible. It is always in conjunction with surface vessel that an air blockade is considered. It is foreseen, however, that due to the three-dimensional activity of the airplane some change in the type of blockade may well come about, and that instead of a blockade being thought of in terms of a "line" it will be conceived of as more of a zone. Because of the ease with which planes might get around the conventional blockade, an increase in the belligerent's blockade radius may well be expected. In some recent discussions of the problem, it was agreed tentatively that a blockade might extend as a zone for 50 miles to sea from the enemy coastline.

Suggestions are not lacking that the concept of an air blockade is erroneous, and that it would be better to discard entirely blockade terminology from air law discussions, substituting instead the phrase "barred zone." Within such an area all travel by neutral or belligerent aircraft might be prohibited upon penalty of being fired upon. Visit and search as an institution would not be present in such a zone. Something analogous to the situation contemplated in Article 30 of the Jurists'

Code may prove more feasible for the air than the classic blockade.

In case the belligerent commanding officer considers that the presence of aircraft is likely to prejudice the success of the operation in which he is engaged at the moment, he may prohibit the passing of neutral aircraft in the immediate vicinity of his forces, or may oblige them to follow a particular route. A neutral aircraft which does not conform to such directions, of which he has had notice issued by the belligerent commanding officer, may be fired upon.

The subject of aircraft and blockade was thoroughly discussed in the Naval War College International Law Situation in 1935.

A blockade maintained by surface vessels only without means of preventing or rendering dangerous the passage of aircraft or submarines would be a "paper blockade" insofar as such craft were concerned even though proclaimed to include these. Any seaplane met at sea by a vessel of war may be visited and searched to determine its relation to the hostilities, and it may be treated according to the evidence found. In recent years, on account of improved means of communication, it would be difficult to prove ignorance.

Professor J. M. Spaight in his Air Power and War Rights, Second Edition, p. 394 et seq., explores the problems of air blockade very thoroughly, and suggests that "a different degree of effectiveness will probably be demanded in the air, because of the greater difficulty of controlling passage in that element."

Penalty for breach of blockade.—Assuming in this situation, however, that an effective blockade in the air is being maintained, it is important to decide just when the *C–12* was encountered by the *Y–2*. If the *C–12* is on the outward lap of the voyage to the blockaded port, it is liable for breach of blockade.

A vessel which in violation of blockade has left a blockaded port or has attempted to enter the port, is liable to capture so long as she is pursued by a ship of the blockading force. (Declaration of London, Art. 20.)

If a vessel has succeeded in escaping from a blockaded port, liability to capture continues, according to American opinion, until the completion of the voyage; but with the termination of the voyage, the offense ends. (Naval Instructions Governing Maritime Warfare, June 30, 1917, No. 31.)

Therefore, if the *Y–2* is a part of the blockading force, and meets the *C–12* while the latter is proceeding from the port of O, the *C–12* may be seized. However, if the latter has completed the round trip, liability has ceased and the *C–12* should be released. According to the traditional Anglo-American opinion as explained by C. C. Hyde, International Law, Vol. II, Page 682, the *C–12* is still liable on the return voyage when met by the *Y–2* even if the latter is not a member of the blockading squadron.

Further Comment on Blockade.—

No term in the whole range of maritime law has been the subject of greater abuse than that of blockade; and, as it was not contended that aircraft could in their present stage of development maintain a blockade in the same sense that surface ships can do, there was evident reason to apprehend that the anticipatory application to their activities of the term blockade would inject into the law an additional element of uncertainty and confusion capable of vast extension. Under the other provisions of the rule a considerable measure of power is conceded to belligerents in regard to the control of the movements of aircraft in the neighborhood of their military operations or military forces, this measure of control would evidently be helpful to a surface force maintaining a blockade, and to a land force maintaining a siege. Whether it is desirable to go further is a question for mature consideration. (John Bassett Moore, International Law & Some Current Illusions & Other Essays, 1924, p. 207.)

"Blockade" is here used in the same sense in which it is employed in Chapter 1 of the Declaration of London, that is to say, an operation of war for the purpose of preventing by the use of warships ingress or egress of commerce to or from a defined portion of the enemy's coast. It has no reference to a blockade enforced without the use of warships, nor does it cover military investments of particular localities on land. These operations, which may be termed "aerial blockade," were the subject of special examination by the experts attached to the various Delegations, who framed a special report on the subject for consideration by the Full Commission. The conditions contemplated in this sub-head are those of warships enforcing a blockade at sea with aircraft acting in co-operation with them. As the primary elements of the blockade will, therefore, be maritime, the recognised principles applicable to such blockade, as for instance, that it must be effective (Declaration of Paris, Art. 4), and that it must be duly notified and its precise limits fixed, will also apply. This is intended to be shown by the use of the words "breach of blockade duly established and effectively maintained" in the text of the sub-head.

It is too early yet to indicate with precision the extent to which the co-operation of aircraft in the maintenance of blockade at sea may be possible; experience alone can show. Nevertheless, it is necessary to indicate the sense in which the Commission has used the word "effective." As pointed out in the Declaration of London, the effectiveness of a blockade is a question of fact. The word "effective" is intended to ensure that it must be maintained by a force sufficient really to prevent access to the enemy coast-line. The prize court may, for instance, have to consider what proportion of surface vessels can escape the watchfulness of the blockading squadrons without endangering the effectiveness of the blockade; this is a question which the prize court alone can determine. In the same way, this question may have to be considered where aircraft are co-operating in the maintenance of a blockade.

The invention of the aircraft cannot impose upon a belligerent who desires to institute a blockade the obligation to employ aircraft in co-operation with his naval forces. If

he does not do so, the effectiveness of the blockade would not be affected by failure to stop aircraft passing through. It is only where the belligerent endeavours to render his blockade effective in the air-space above the sea as well as on the surface itself that captures of aircraft will be made and that any question of the effectiveness of the blockade in the air could arise.

The facility with which an aircraft, desirous of entering the blockaded area, could evade the blockade by passing outside the geographical limits of the blockade has not escaped the attention of the Commission. This practical question may affect the extent to which belligerents will resort to blockade in future, but it does not affect the fact that where a blockade has been established and an aircraft attempt to pass through into the blockaded area within the limits of the blockade, it should be liable to capture.

The Netherlands Delegation proposed to suppress (i) on the grounds that air blockade could not be effectively maintained, basing its opinion on its interpretation of the experts' report on the subject.

The British, French, Italian and Japanese Delegations voted for its maintenance. The American Delegation voted for its maintenance *ad referendum.* (Jurists' Report, 1923, Comment upon Art. 53, Sec. i.)

Visit and search and air mail.—An airplane carrying mail is not immune from visit and search. According to Hague Convention XI, Relating to the Exercise of the Right of Capture in Naval War "the inviolability of postal correspondence does not exempt a neutral mail ship from the laws and customs of maritime war as to neutral merchant ships in general" (Art. 2). There is no legal reason, therefore, why the *Y–2* may not order the *D–20* to alight for visit and search. Though mail ships are not immune from belligerent visit and search, private correspondence on board is supposed to be inviolable (Hague Convention XI, Art. 1). The World War experience demonstrated,

however, that this inviolability is exceedingly uncertain, the result of the concessions made by the United States being in substance that private mail may be opened in order that the belligerent may determine whether it is inviolable or not. The Allied contention during the war was that the mail privileges were being abused by private persons who inserted contraband articles into their correspondence. The whole subject of mails was thoroughly reviewed and studied in Situation II, of the International Law Situations in 1928.

The situation when a seacraft endeavors to visit and search an aircraft is one involving exceptional dangers to the aircraft. Mere suspicion does not justify the subjection of aircraft to undue risk. Craft carrying mails should not be unnecessarily delayed. The mail carrier does not know what are the contents of the mail pouches and is not directly concerned with these contents. Guilt cannot be presumed. Destruction on ground of any act prior to the summons cannot easily be justified. (Naval War College Situations, 1928, pp. 70–71.)

The *D–20* even though it may be a state-owned craft, cannot be regarded by the *Y–2* as a military plane. In these days of increasing governmental ownership, with governments engaged in all kinds of new activities, the law still treats the vessels and planes owned by governments and performing non-military functions as private craft. e. g. The Habana Convention, 1928, Art. 3, op. cit.) The *D–20* may not be shot down as a military plane. In conducting visit and search the *Y–2* must follow the traditional rules applicable to merchant vessels. (Jurists' Report, Art. 56, Par. 3.)

Inasmuch as the military messages, funds, and military materials were carried in the regular airmail, the *D–20* was not guilty of unneutral service.

It was not engaged in a special voyage, nor was it under special charter to a belligerent state. As previously remarked, a craft carrying contraband even though caught *in delicto* is not liable unless its owners or operators could be presumed to know the nature of the cargo. The articles here were transported in the normal postal pouches, so that the *D–20* pilot or owner presumably had no knowledge of their contents. It is doubtful whether the articles here can be considered as contraband anyway because they were probably belligerent owned emanating as they did from a belligerent port. In any case, the *D–20* is guilty neither of unneutral service nor of carriage of contraband. The fact that mere carriage of the mails in regular pouches is not unneutral service is well explained in Spaight op. cit. page 392 and Oppenheim, International Law, 1935, Vol. II, page 699. Furthermore, the liability for carrying contraband and for unneutral service does not extend beyond the end of the voyage in which the craft was engaged in such an enterprise. The *D–20* probably having completed the voyage, is no longer subject to penalty. Possibly, if it were encountered while flying over the blockade line, or on a voyage on which it had broken the blockade, it could be seized as a blockade runner, but the facts in this case scarcely warrant such a conclusion.

Contraband and continuous voyage.—The issue raised in the case of the *E–30* is obviously one of "continuous voyage." This is really a part of the subject of contraband, for "continuous voyage" relates to the carriage of contraband articles by an indirect route. In contraband there are two elements, destination and the nature of the goods.

There must be an enemy destination and the goods must be neutral owned and of a nature useful for war. "Continuous voyage" involves the destination element in contraband, the belligerent in such matters claiming that the goods, though directed initially to neutral ports, are actually designed for trans-shipment or a continuation of the journey to belligerent hands. The doctrine first became important when neutrals attempted to circumvent the British Rule of 1756, according to which commerce between the mother country and the colonies, closed in peace time to third states, could not be opened to neutral ships in time of war. Triangular trade, such as that between the West Indies, an American port, and France, in which American (neutral) ships were engaged in carrying articles indirectly around two legs of a journey instead of directly between the West Indies and France, was intercepted and condemned by the British on the grounds that the trade really constituted one "continuous voyage." (The William, 1806, VI C. Robinson, 316.)

This doctrine was transferred to contraband and blockade during the American Civil War and was greatly extended during the last war when it really became a doctrine of ultimate destination and of substitution. The British prize courts condemned cargoes when there was no direct evidence that the goods were actually going to Germany and, instead, employed presumptions based upon statistics and obscure evidence. (The Kim, L. R., 1915, p. 215; the Baron Stjernblad, L. R. 1918, A. C. 173; The Bonna, L. R. 1918, p. 123.) In the last named of these, the doctrine of substitution made an appearance in the court's suggestion that even though the cocoanut oil on board did not actually go through

Sweden to Germany it might enable the Swedes to release a certain amount of margarine and butter from their "reservoir of fats" to Germany.

The subject of "continuous voyage" has been thoroughly treated in previous Naval War College Situations and material in this subject will be found in the volumes issued in 1922 and 1926. In the case of the *E–30* the contraband cargo has evidently been deposited, so that the aircraft is no longer liable, the rules and argumentation being the same as those discussed in Section (*a*) for the *B–17*.

Aircraft and unneutral service.—The international law rules in regard to unneutral service for merchant ships have been carried over into the law dealing with aircraft. This was recognized in Article 53, Section (*c*) of the Jurist's report which stated that "A neutral private aircraft is liable to capture if it * * * is engaged in unneutral service." Other drafts and plans for air law in wartime have also assumed that unneutral service would be a part of the air rules. Therefore, those acts which constitute unneutral service on the part of surface ships will also be unneutral service in the air. Maritime and air regulations will thus coincide, there being no reason why the different character of aircraft should create the necessity for genuinely new regulations or serious modifications in the old.

ART. 45. A neutral vessel is liable to be condemned and in a general way, is liable to the same treatment which a neutral vessel would undergo when liable to condemnation on account of contraband of war.

(1) If she is making a voyage specially with a view to the transport of individual passengers who are embodied in the

armed force of the enemy, or with a view to the transmission of information in the interest of the enemy.

(2) If, with the knowledge of the owner, of the one who charters the vessel entire, or of the master, she is transporting a military detachment of the enemy, or one or more persons who, during the voyage, lend direct assistance to the operations of the enemy. In the cases specified in the preceding paragraphs (1) and (2), goods belonging to the owner of the vessel are likewise liable to condemnation.

The provisions of the present Article do not apply if when the vessel is encountered at sea she is unaware of the opening of the hostilities, or if the master, after becoming aware of the opening of hostilities, has not been able to disembark the passengers. The vessel is deemed to know of the state of war if she left an enemy port after the opening of hostilities, or a neutral port after there had been made in sufficient time a notification of the opening of hostilities to the Power to which such port belongs.

ART. 46. A neutral vessel is liable to be condemned and, in a general way, is liable to the same treatment which she would undergo if she were a merchant-vessel of the enemy:

(1) If she takes a direct part in the hostilities.

(2) If she is under the orders or under the control of an agent placed on board by the enemy Government.

(3) If she is chartered entirely by the enemy Government.

(4) If she is at the time and exclusively either devoted to the transport of enemy troops or to the transmission of information in the interest of the enemy.

In the cases specified in the present Article, the goods belonging to the owner of the vessel are likewise liable to condemnation.

ART. 47. Any individual embodied in the armed force of the enemy and who is found on board a neutral merchant-vessel, may be made a prisoner of war, even though there be no ground for the capture of the vessel. (Declaration of London, 1909.)

Unneutral service has been discussed previously in Naval War College Situations, the 1928 volume dealing carefully with this subject. In the résumé

that year, page 106, is found the following conclusion:

> While there has been a tendency to extend the scope of unneutral service, it is evident from practice, instructions, decisions, etc., that the principles of the Declaration of London of 1909 were generally accepted at the beginning of the World War in 1914. Where extreme action was taken during the World War on the ground of reprisals such action followed no precedent based on general practice.

The essence of unneutral service, or rather its chief ingredient, consists in the undertaking *specially* to perform some service for a belligerent. By engaging in such special undertakings, the neutral ship or plane divests itself of its normal commercial character and performs a military job. Unneutral service is thus distinguishable from contraband because in the latter the neutral ship is engaged in commercial enterprise, while in the former it is participating directly in a belligerent's affairs. Where an airplane like the *G–40* is carrying a belligerent general under a special charter it is clearly engaged in unneutral service for which the penalty is the seizure of the plane. If the general took passage on a regular commercial flight, and if the ship and its owners did not go out of their way to accommodate the general, there would be no liability. For a clear analysis of air law in regard to unneutral service see Spaight, op. cit., page 390 et. seq.

Period of liability for unneutral service by aircraft.—In the present case of the *G–40* if that plane has completed the round trip journey from the port in state G to the military headquarters of state X, its liability is at an end provided, as above indicated, the usual maritime law is made applica-

ble in toto to the air. In regard to penalty, however, there is some indication that for aircraft, liability is not discharged when the special service is terminated. In Article 6 of the Jurists' code it is stipulated that where a neutral vessel or aircraft transmits information to a belligerent concerning military operations, "liability to capture * * * is not extinguished by the conclusion of the voyage or flight on which the vessel or aircraft was engaged at the time, but shall subsist for a period of one year after the act complained of." Thus the air rules regarding penalty for unneutral service may become more stringent in the future. The fact that an airplane can deviate nowadays so easily and is relatively so mobile and swift that it can perform special services more frequently and expeditiously than can surface vessels indicates that for air law the period of liability will probably be longer than it has been for maritime law.

Résumé.—Although at the present time there are no binding rules of international law in regard to the conduct of hostilities in the air, and in regard to neutral and belligerent rights in the air, it is apparent that most of the conceptions and many of the rules of maritime law will be carried over into the rules for the air. The traditional rights of visit and search and of seizure on the grounds of contraband, blockade, and unneutral service will belong to belligerents in future conflicts. International agreement on the application of these rights is desperately needed. Because of the difficulties involved in carrying out visit and search, difficulties inherent in the nature of aircraft, future belligerents may be tempted to dis-

pense entirely with restraints and to shoot down neutral and enemy craft more or less indiscriminately. For the avoidance of such an unfortunate state of affairs, it is imperative that practical rules be devised.

The technique of visit and search in the air must be evolved with proper regard for the nature of aircraft. Unlike merchant vessels, aircraft must deviate in order to undergo visit and search, and agreement must be arrived at on such matters as proper landing places, weather conditions, and fuel supplies. It is essential, too, that nations make a convention on the method of signalling a neutral plane, it being probable that the traditional shot "across the bow" will not be feasible, and it being necessary further to establish uniformity in airplane radio sets, equipment for receiving, etc.

The air may bring modifications in the customary laws and rules relating to contraband and blockade. The high speeds of planes and the ease with which they can cross a line of blockade, may cause belligerents and neutrals to agree upon some sort of certificate scheme in the place of the conventional visit and search for contraband, and upon a "barred zone" in lieu of the old-time maritime blockade. Tentative agreements upon some of these matters, particularly those relating to the methods of signalling for visit and search, should be sought immediately, though the experience of future conflicts, if and when they come, will play a leading rôle in the development of the law.

As for the penalties involved in carriage of contraband, breach of blockade, and unneutral service, a tendency towards a greater severity is distinctly discernible. Facilities possessed by aircraft

for eluding capture and for making frequent trips, make it not unreasonable for the law to extend the period of liability beyond that customarily possessed by surface vessels. Planes may not, therefore, expect immunity when they have deposited contraband or terminated their act of unneutral service.

For the present, given the absence of formulated rules, the solution to air problems must be sought to a great extent upon the basis of analogy to maritime law, with distinct modifications, however, where these are called for by reason of the nature of aircraft. Although it has not been customary in international law to concede favors or privileges to new weapons because they possessed special handicaps or weaknesses, the laws of physics, that is, the fact that airplanes move in a three-dimensional realm and cannot stand still in the air, force modifications in the rules, not as a matter of special privilege, but as a matter of absolute necessity. This does not mean, therefore, that belligerent aircraft can claim freedom from legal restrictions merely because it is difficult to conform to formerly accepted principles. It does mean that the legal restraints must be adapted to the peculiar needs of the air. Nor may neutral craft claim special privileges merely because airplanes are relatively frail, and because the exercise of belligerent force might endanger the whole craft. An adjustment of risks and restraints can be made upon the basis of established principles with neutrals accepting interference with their air commerce and belligerents abandoning any pretentions to ruthlessness and arbitrary actions. The great belligerent-neutral compromises on visit and search,

contraband, blockade and unneutral service may be continued with necessary changes occasioned by the nature of the medium involved.

SOLUTION

In each instance the *Y–2* may lawfully visit and search the neutral aircraft.

(*a*) The *B–17* should be released.

(*b*) If the *Y–2* is a member of the blockading squadron and if it meets the *C–12* while the latter is engaged on the return voyage, the *C–12* should be seized and held for prize court adjudication. If the *Y–2* encounters the *C–12* after the latter has completed the round trip journey, the *C–12* should be released. If the *Y–2* is not a member of the blockading squadron but meets the *C–12* while the latter is on the return trip, the *C–12* may be seized and held for prize court adjudication.

(*c*) The *D–20* should be released.

(*d*) The *E–30* should be released.

(*e*) If the *G–40* is no longer under special charter, and if it has completed the journey for which it was hired, it should be released.

167533—40——4

Situation II

FORCE SHORT OF WAR: BLOCKADE AND OCCUPATION IN TIME OF PEACE

There are strained relations between states M and N. Armed land and naval forces of state N enter the jurisdiction of state M without declaration of war and there claim the rights to which a military occupant would be entitled. In state M, states S and T, by virtue of treaty agreement with state M, have special rights in respect to exemption of persons and property from local jurisdiction. State N announces a pacific blockade of the coasts and ports of state M.

(*a*) In its regular voyage the *Safa,* a freighter lawfully flying the flag of state S, with a cargo of munitions, is about to enter port O of state M when summoned by radio from an aircraft to lie to for 24 hours or until a cruiser of state N arrives to visit and search the *Safa.* The *Safa* asks aid and instructions from the *Sogu,* a vessel of war of state S which is in port. What action should the commander of the *Sogu* take?

(*b*) A commercial aircraft, the *T–21,* registered in state T, is on the following day, when entering port O, ordered by the *Noan,* a cruiser of state N, to land at a nearby airport, which is in the control of forces of N, in order that its identity and right to pass may be established. The *T–21* continues its flight toward port O and is fired upon by the *Noan* and damaged so that it is obliged to land on

the beach near the *Tafu,* a cruiser of state T. The *Noan* continues to fire upon the *T–21.* What action should the commander of the *Tafu* take?

(*c*) Under the treaty, the consul of state T has complete jurisdiction over nationals of state T at Mount, a city of state M up a river and 150 miles from the coast. Later the *Tafu* anchors off Mount. The land and air forces of state N seize the city and order two nationals of state T, accused of a crime against citizens of state M to be turned over to authorities of N for trial. The consul of state T demands that they be turned over to him, and when the authorities of N demand the two nationals from state M, the consul requests the aid of the commander of the *Tafu* in obtaining and trying the accused. What action should the commander of the *Tafu* take?

SOLUTION

(*a*) If the airplane is still with the *Safa,* the commander of the *Sogu* should direct the *Safa* to lie to, should proceed to the *Safa* to protect it, and should notify the commander of the N forces that the *Safa* is a vessel of state S and is not to be molested, identification being all that the *Safa* is legally required to furnish the airplane. If the airplane has left the *Safa,* the *Sogu* should direct the latter to proceed into the port, and, if deemed essential for the protection of the *Safa,* the *Sogu* should accompany it into the port.

(*b*) The commander of the *Tafu* should warn the *Noan* that if the latter continues to fire upon the *T–21,* he will fire upon the *Noan* to force it to desist. He should attempt to interpose the *Tafu* between the *Noan* and the airplane with the object

of halting the firing and should send out a small boat to rescue the survivors of the *T–21.*

(*c*) The commander of the *Tafu* should consult with the consul of state T at Mount and should report the incident to his superiors in the Navy Department. A demand for the return of the nationals of state T or a threat of the use of force on the part of the commander of the *Tafu* would not be warranted by the facts of this situation. As long as no immediate threat to the lives and property of state T nationals is involved, the matter is one for diplomatic negotiation between states T and N.

NOTES

"Strained relations."—The strained relations between states M and N do not constitute a state of war. War in the legal sense depends for its existence not merely upon the presence of an armed clash (the objective criterion of war) but also upon the intent either of one of the parties to the clash or upon the intent of a third party or parties (the subjective criterion). In the past, at least, war in the legal sense has been a status resulting from some sort of a blend of these two criteria, although it is to be remembered that legal war may exist without the use of force and that all use of force is not war. The anomalies of this situation have been so great and definition of war has become so elusive, that strong suggestions are being made either to eliminate war entirely from the vocabulary of international law, or to make war in the legal sense practically synonymous with the use of force. In the present situation, however, it is plain that though there is an armed clash between states

M and N there is no war. There is no question, therefore, of belligerent rights or of neutral rights in the strict legal sense. The situation is obviously analogous to the Sino-Japanese conflict which began in 1937.

Nature of the Sino-Japanese clash.—

May the present extensive military operations of Japanese forces on Chinese soil be explained on the ground of war?

No declaration of war has been made by either side in the conflict, although the Hague Convention of 1907, to which China and Japan are parties, provides that hostilities should not commence without previous and explicit warning to the other party and notice to neutral Powers. The exercise of belligerent rights of blockade, visit, search and capture have not been resorted to by either side. Diplomatic relations have not been broken off although the heads of missions retired after the fall of Nanking. Consuls generally remain at their posts and commercial intercourse has continued, although naturally on a much reduced scale. On the other hand, extensive military operations have been in progress between the Japanese and Chinese armies since early July, 1937. Something like a million troops are said to be engaged on both sides, and something over thirty-five warships have taken part in the operations. Bombardments by warships, heavy artillery and war planes have been extensive and destructive to life and property. As early as August 25 Admiral Hasegawa declared a blockade of certain Chinese coasts against Chinese vessels, and Chinese vessels running the blockade have been captured and sunk. Provisional governments in the nature of military governments supported by armed forces have been set up by Japan in the conquered territory. Neutrals have been warned to withdraw from areas of hostilities, and encroachments have been made by Japanese forces upon the foreign settlement areas. (L. H. Woolsey, American Journal of International Law, Vol. 32, p. 317.)

Report of the Nine Power Brussels Conference.—Following is the text of the report adopted

on November 24, 1937, by the Nine Power Conference at Brussels, Belgium:

"The Conference at Brussels was assembled pursuant to an invitation extended by the Belgian Government at the request of His Majesty's Government in the United Kingdom with the approval of the American Government. It held its opening session on November 3, 1937. The Conference has now reached a point at which it appears desirable to record the essential phases of its work.

"In the winter of 1921–22 there were signed at Washington a group of inter related treaties and agreements of which the Nine Power Treaty regarding principles and policies to be followed in matters concerning China constituted one of the most important units. These treaties and agreements were the result of careful deliberation and were entered into freely. They were designed primarily to bring about conditions of stability and security in the Pacific area.

"The Nine Power Treaty stipulates in Article one that—

"'The Contracting Powers, other than China agree:

"'(1) To respect the sovereignty, the independence, and the territorial and administrative integrity of China;

"'(2) To provide the fullest and most unembarrassed opportunity to China to develop and maintain for herself an effective and stable government;

"'(3) To use their influence for the purpose of effectually establishing and maintaining the principle of equal opportunity for the commerce and industry of all nations throughout the territory of China;

"'(4) To refrain from taking advantage of conditions in China in order to seek special rights or privileges which would abridge the rights of subjects or citizens of friendly States, and from countenancing action inimical to the security of such States.'

"Under and in the light of these undertakings and of the provisions contained in the other treaties, the situation in the Pacific area was for a decade characterized by a substantial measure of stability, with considerable progress towards the other objectives envisaged in the treaties. In recent years there have come a series of conflicts between

Japan and China, and these conflicts have culminated in the hostilities now in progress.

"The Conference at Brussels was called for the purpose, as set forth in the terms of the invitation 'of examining in conformity with Article seven of that treaty, the situation in the Far East and of studying peaceable means of hastening an end of the regrettable conflict which prevails there.' With the exception of Japan, all of the signatories and adherents to the Nine Power Treaty of February 6, 1922 accepted the invitation and sent representatives to Brussels for the purpose stated in the invitation.

"The Chinese Government, attending the Conference and participating in its deliberations, has communicated with the other parties to the Nine Power Treaty in conformity with Article 7 of that treaty. It has stated here that its present military operations are purely in resistance to armed invasion of China by Japan. It has declared its willingness to accept a peace based upon the principles of the Nine Power Treaty and to collaborate wholeheartedly with the other powers in support of the principle of the sanctity of treaties.

"The Japanese Government in replying with regret that it was not able to accept the invitation to the Conference affirmed that 'the action of Japan in China is a measure of self defense which she has been compelled to take in the face of China's fierce anti Japanese policy and practice and especially by her provocative action in resorting to force of arms; and consequently it lies, as has been declared already by the Imperial Government, outside the purview of the Nine Power Treaty'; and advanced the view that an attempt to seek a solution at a gathering of so many powers 'would only serve to complicate the situation still further and to put serious obstacles in the path of a just and proper solution'.

"On November 7, 1937 the Conference sent through the Belgian Government to the Japanese Government a communication in the course of which the Conference inquired whether the Japanese Government would be willing to depute a representative or representatives to exchange views with representatives of a small number of powers to be chosen for that purpose, the exchange of views to take place

within the framework of the Nine Power Treaty and in conformity with the provisions of that treaty, toward throwing further light on points of difference and facilitating a settlement of the Sino-Japanese conflict. In that communication the representatives of the states met at Brussels, expressed their earnest desire that peaceful settlement be achieved.

"To that communication the Japanese Government replied in a communication of November 12, 1937 stating that it could not do otherwise than maintain its previously expressed point of view that the present action of Japan in her relations with China was a measure of self defense and did not come within the scope of the Nine Power Treaty; that only an effort between the two parties would constitute a means of securing the most just and the most equitable settlement, and that the intervention of a collective organ such as the Conference would merely excite public opinion in the two countries and make it more difficult to reach a solution satisfactory to all.

"On November 15 the Conference adopted a declaration in the course of which it affirmed that the representatives of the Union of South Africa, the United States of America, Australia, Belgium, Bolivia, Canada, China, France, the United Kingdom, India, Mexico, Netherlands, New Zealand, Portugal, and the Union of Soviet Socialist Republics '* * * consider this conflict of concern in fact to all countries party to the Nine Power Treaty of Washington of 1922 and to all countries party to the Pact of Paris of 1928 and of concern in fact to all countries members of the family of nations.'

"In the presence of this difference between the views of the Conference and of the Japanese Government there now appears to be no opportunity at this time for the Conference to carry out its terms of reference insofar as they relate to entering into discussions with Japan towards bringing about peace by agreement. The Conference therefore is concluding this phase of its work and at this moment of going into recess adopts a further declaration of its views.

"The text of the communication sent to the Japanese Government on November 7, 1937 reads as follows:

" 'The representatives of the states met in Brussels on November 3, last, have taken cognizance of the reply which

the Japanese Government sent in of October 27 to the invitation of the Belgian Government, and the statement which accompanied this reply.

" 'In these documents the Imperial Government states that it cherishes no territorial ambitions in respect of China and that on the contrary it sincerely desires "to assist in the material and moral development of the Chinese nation", that it also desires "to promote cultural and economic cooperation" with the foreign powers in China and that it intends furthermore scrupulously "to respect foreign rights and interest in that country."

" 'The points referred to in this declaration are among the fundamental principles of the Treaty of Washington of February 6, 1922 (The Nine Power Treaty). The representatives of the states parties to this treaty have taken note of the declarations of the Imperial Government in this respect.

" 'The Imperial Government moreover denies that there can be any question of a violation of the Nine Power Treaty by Japan and it formulates a number of complaints against the Chinese Government. The Chinese Government for its part contends that there has been violation, denies the charges of the Japanese Government and, in turn, makes complaint against Japan.

" 'The treaty has made provision for just such a situation. It should be borne in mind that the exchange of views taking place in Brussels is based essentially on these provisions and constitutes "full and frank communication" as envisaged in Article VII. This Conference is being held with a view to assisting in the resolving by peaceful means of a conflict btween parties to the treaty.

" 'One of the parties to the present conflict, China, is represented at the Conference and has affirmed its willingness fully to cooperate in its work.

" 'The Conference regrets the absence of the other party, Japan, whose cooperation is most desirable.

" 'The Imperial Government states that it is "firmly convinced that an attempt to seek a solution at a gathering of so many powers whose interests in East Asia are of varying degree, or who have practically no interests there at all, will only serve to complicate the situation still further and

to put serious obstacles in the path of a just and proper solution."

" 'It should be pointed out that all of these powers which are parties to the treaty are, under the terms of this instrument, entitled to exercise the rights which the treaty confers upon them; that all powers which have interests in the Far East are concerned regarding the present hostilities; and that the whole world is solicitous with regard to the effect of these hostilities on the peace and security of the members of the family of nations.

" 'However, the representatives of the states met at Brussels believe that it may be possible to allay Japan's misgivings referred to above; they would be glad to know whether the Imperial Government would be disposed to depute a representative or representatives to exchange views with representatives of a small number of powers to be chosen for that purpose. Such an exchange of views would take place within the framework of the Nine Power Treaty and in conformity with the provisions of that treaty. Its aims would be to throw further light on the various points referred to above and to facilitate a settlement of the conflict. Regretting the continuation of hostilities, being firmly convinced that a peaceful settlement is alone capable of insuring a lasting and constructive solution of the present conflict, and having confidence in the efficacy of methods of conciliation, the representatives of the states met at Brussels earnestly desire that such a settlement may be achieved.

" 'The states represented at the Conference would be very glad to know as soon as possible the attitude of the Imperial Government towards this proposal.'

"The text of the declaration adopted by the Conference November 24, 1937 reads as follows:

" 'The Nine Power Treaty is a conspicuous example of numerous international instruments by which the nations of the world enunciate certain principles and accept certain self denunciatory rules in their conduct with each other solemnly undertaking to respect the sovereignty of other nations, to refrain from seeking political or economic domination of other nations, and to abstain from interference in their internal affairs.

" 'These international instruments constitute a framework within which international security and international peace are intended to be safeguarded without resort to arms and within which international relationships should subsist on the basis of mutual trust, good will and beneficial trade and financial relations.

" 'It must be recognized that whenever armed force is employed in disregard of these principles the whole structure of international relations based upon the safeguards provided by treaties is disturbed. Nations are then compelled to seek security in ever increasing armaments. There is created everywhere a feeling of uncertainty and insecurity. The validity of these principles cannot be destroyed by force, their universal applicability cannot be denied and indispensability to civilization and progress cannot be gainsaid.

" 'It was in accordance with these principles that this Conference was called in Brussels for the purpose, as set forth in the terms of the invitation issued by the Belgian Government "of examining in conformity with article seven of the Nine Power Treaty, the situation in the Far East and of studying peaceable means of hastening an end of the regrettable conflict which prevails there".

" 'Since its opening session on November 3rd the Conference has continuously striven to promote conciliation and has endeavored to secure the cooperation of the Japanese Government in the hope of arresting hostilities and bringing about a settlement.

" 'The Conference is convinced that force cannot provide just and lasting solution for disputes between nations. It continues to believe that it would be to the immediate and the ultimate interest of both parties to the present dispute to avail themselves of the assistance of others in an effort to bring hostilities to an early end as a necessary preliminary to the achievement of a general and lasting settlement. It further believes that a satisfactory settlement cannot be achieved by direct negotiation between the parties to the conflict alone and that only by consultation with other powers principally concerned can there be achieved an agreement the terms of which will be just, generally acceptable and likely to endure.

" 'This Conference strongly reaffirms the principles of the Nine Power Treaty as being among the basic principles which are essential to world peace and orderly progressive development of national and international life.

" 'The Conference believes that a prompt suspension of hostilities in the Far East would be in the best interests not only of China and Japan but of all nations. With each day's continuance of the conflict the loss in lives and property increases and the ultimate solution of the conflict becomes more difficult.

" 'The Conferenec therefore strongly urges that hostilities be suspended and resort be had to peaceful processes.

" 'The Conference believes that no possible step to bring about by peaceful processes a just settlement of the conflict should be overlooked or omitted.

" 'In order to allow time for participating governments to exchange views and further explore all peaceful methods by which a just settlement of the dispute may be attained consistently with the principles of the Nine Power Treaty and in conformity with the objectives of that treaty the Conference deems it advisable temporarily to suspend its sittings. The conflict in the Far East remains, however, a matter of concern to all the powers assembled at Brussels—by virtue of commitments in the Nine Power Treaty or of special interest in the Far East—and especially to those most immediately and directly affected by conditions and events in the Far East. Those of them that are parties to the Nine Power Treaty have expressly adopted a policy designed to stabilize conditions in the Far East and, to that end, are bound by the provisions of that treaty, outstanding among which are those of articles 1 and 7.

" 'The Conference will be called together again whenever its chairman or any two of its members shall have reported that they consider that its deliberations can be advantageously resumed.' "

Both China and Italy requested that statements of position they made should be considered as integral parts of the report. (Press Releases, Vol. XVII, No. 426.)

Policy of the United States—General.—

At his press conference on August 17, 1937 the Secretary of State announced that (1) legislative action to make available funds for purposes of emergency relief necessitated by the situation in the Far East had been asked and that (2) this Government had given orders for a regiment of marines to prepare to proceed to Shanghai. The Secretary then discussed at some length the principles of policy on which this Government was proceeding.

The situation in Shanghai is in many respects unique. Shanghai is a great cosmopolitan center, with a population of over three million, a port which has been developed by the nationals of many countries, at which there have prevailed mutually advantageous contacts of all types and varieties between and among the Chinese and people of almost all other countries of the world. At Shanghai there exists a multiplicity of rights and interests which are of inevitable concern to many countries, including the United States.

In the present situation, the American Government is engaged in facilitating in every way possible an orderly and safe removal of American citizens from areas where there is special danger. Further, it is the policy of the American Government to afford its nationals appropriate protection, primarily against mobs or other uncontrolled elements. For that purpose it has for many years maintained small detachments of armed forces in China, and for that purpose it is sending the present small reinforcement. These armed forces there have no mission of aggression. It is their function to be of assistance toward maintenance of order and security. It has been the desire and the intention of the American Government to remove these forces when performance of their function of protection is no longer called for, and such remains its desire and expectation.

The issues and problems which are of concern to this Government in the present situation in the Pacific area go far beyond merely the immediate question of protection of the nationals and interests of the United States. The conditions which prevail in that area are intimately connected with and have a direct and fundamental relationship to the

general principles of policy to which attention was called in the statement of July 16, which statement has evoked expressions of approval from more than 50 governments. This Government is firmly of the opinion that the principle summarized in that statement should effectively govern international relationships.

When there unfortunately arises in any part of the world the threat or the existence of serious hostilities, the matter is of concern to all nations. Without attempting to pass judgment regarding the merits of the controversy, we appeal to the parties to refrain from resort to war. We urge that they settle their differences in accordance with principles which, in the opinion not alone of our people but of most peoples of the world, should govern in international relationships. We consider applicable throughout the world, in the Pacific area as elsewhere, the principles set forth in the statement of July 16. That statement of princples is comprehensive and basic. It embraces the principles embodied in many treaties, including the Washington Conference treaties and the Kellogg-Briand Pact of Paris.

From the beginning of the present controversy in the Far East, we have been urging upon both the Chinese and the Japanese Governments the importance of refraining from hostilities and of maintaining peace. We have been participating constantly in consultation with interested governments directed toward peaceful adjustment. This Government does not believe in political alliances or entanglements, nor does it believe in extreme isolation. It does believe in international cooperation for the purpose of seeking through pacific methods the achievement of those objectives set forth in the statement of July 16. In the light of our well-defined attitude and policies, and within the range thereof, this Government is giving most solicitous attention to every phase of the Far Eastern situation, toward safeguarding the lives or welfare of our people and making effective the policies—especially the policy of peace—in which this country believes and to which it is committed.

This Government is endeavoring to see kept alive, strengthened, and revitalized, in reference to the Pacific area and to all the world, these fundamental principles. (Press Releases, Vol. XVII, No. 413.)

Self-help and strained relations—Reprisals.—The use of force without war is legal but few crystallized rules exist to govern the relations of the combatants and the relations between these and third states. In theory, due to the absence of an organized international government with the power to enforce law, states have been legally justified in taking the law into their own hands and employing force for the defense of their rights. This is the system (or lack of system) known as Self-Help. According to the theory there is a well defined set of rights and duties belonging to the members of the international community; these members, in the absence of international agencies, are to decide what their rights and duties are and are authorized to apply measures of coercion in the execution of the law. If all states were more or less equal, this system might operate in line with the theory, but in practice, because of the vast inequalities between the strengths of various nations, it has led to grave abuses, and what should have been legal measures of law enforcement turn out to be in fact means for political domination and control by the stronger against the weaker. The virtual collapse of the theory in operation is due not only to state inequality but also to the fact that each state has been its own prosecutor, judge and enforcing agent.

The law on this subject of Self-Help is therefore woefully deficient. It has had to trail along after the practice of the great powers tidying up in haphazard fashion the actions of strong states which have claimed to be enforcing their legal rights and which have not been called to account except belatedly by relatively few publicists and students. Judges and law interpretators for the most part

have accepted the fact of the use of force because of necessity and have thus built up a certain amount of pragmatic law based mainly on the de facto use of power and not on the basis of the genuine mutual self-interest of states in general.

Probably the most common and general term for these measures of Self-Help which do not involve war, is that of reprisal, though it is to be remembered that war itself is often justified as the ultimate reprisal. Theoretically, a reprisal is a legal act of redress performed by a state to obtain satisfaction for an injury received. Force is not justified legally unless there has been a refusal to make redress after due notice. As above indicated, however, these allegedly legal measures are usually highly colored by political motives and objectives, so that while a great state has "justified" a reprisal upon the grounds of self-help, actually the venture has most often been of very dubious legality, the law serving chiefly as a thin veneer to cover what in essence was an illegal act.

Reprisals may take several forms, such as military occupation, naval bombardment, attacks upon commerce, embargo, boycott, and pacific blockade. The history of reprisals and an analysis of their employment are admirably described in Hindmarsh, A. E. "Force in Peace." The sanctions outlined in Article 16 of the League of Nations Covenant are designed to be collective reprisals, and to be of a legal rather than a political nature, in that they were to be employed by a community agency after a careful study. Some of these problems were thoroughly studied in the Naval War College Situations in 1932, pages 89 to 135.

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Pacific blockade.—The United States has consistently denied the legality of interference with vessels of third states by a squadron applying a pacific blockade. As there is no war and therefore no belligerent rights, legally there can be no visit and search, but a blockading vessel has the right to identify ships attempting to pass the blockade.

It may be necessary that the blockading forces approach, within the specific area of effective maintenance of the blockade, vessels of third states, for the purpose of verification of their right to fly the flag. (Naval War College Situations, 1932, p. 95.)

Pacific blackade in the Sino-Japanese conflict.—

More important than these subsidiary operations was the navy's part in hindering the replenishment from abroad of Chinese stocks of military equipment. A "pacific blockade"—proclaimed on August 25 by the commander of the Japanese China fleet—for territory between the mouth of the Yangtze and Swatow was extended on September 5 to include virtually the entire Chinese coast, from the Manchurian border to Pakhoi in the south. Since Japan, not being legally at war, did not possess the right of a belligerent to intercept shipments of contraband in neutral ships, the blockade was directed against Chinese vessels alone. While a naval spokesman at Shanghai threatened to preempt such cargoes if carried in non-Chinese craft, Tokyo declared that the "peaceful commerce" of third powers would not be molested. This term, however, was not construed to cover foreign vessels specifically employed for the purpose of carrying war supplies to the Chinese. Apparently reluctant to challenge the doubtful legality of this exception, both the United States and Great Britain took measures to avoid incidents in the blockaded zone. British shipping was advised that, in the absence of a British warship, Japanese naval officers should be permitted to board ship and verify certificates of registry—a procedure which would tend to prevent use of the British flag as a ruse by Chinese vessels. Once foreign countries had acquiesced to

this extent in the Japanese procedure, Tokyo authorities let it be known that "for the present" there would be no interference with any foreign shipping. This course was probably adopted because it was believed that the volume of military supplies shipped by sea to China, after these government warnings, would be too small to warrant the risk of foreign complications over their seizure. (Foreign Policy Reports, May 15, 1938, p. 55.)

Following a conference with the Secretary of State and the Chairman of the United States Maritime Commission, the President today, September 14, 1937, issued the following statement:

"Merchant vessels owned by the Government of the United States will not hereafter, until further notice, be permitted to transport to China or Japan any of the arms, ammunition, or implements of war which were listed in the President's proclamation of May 1, 1937.

"Any other merchant vessels, flying the American flag, which attempt to transport any of the listed articles to China or Japan will, until further notice, do so at their own risk.

"The question of applying the Neutrality Act remains in *statu quo*, the Government policy remaining on a 24-hour basis."

ANNOUNCEMENT

The conflict in the Far East has resulted in the creation of a danger zone along the coast of China which makes it dangerous for American merchant vessels to operate in the adjacent waters.

The Japanese authorities have announced a blockade of the entire coast from Chinwangtao to Pakhoi against the entrance or egress of Chinese shipping.

The Chinese authorities have announced their intention, in view of the blockade, to take appropriate action against all Japanese naval vessels along the Chinese coast and have requested that naval and merchant vessels of third powers avoid proximity to Japanese naval vessels and mili-

tary transports and have their respective national colors painted on their top decks in a conspicuous manner.

The Chinese authorities have also announced the following:

(*a*) The mouth of Min Kiang River in Fukien Province has been closed to navigation, and all shipping through that place has been suspended as of September 4.

(*b*) Beginning September 9 no foreign merchant vessels will be permitted to navigate at night in waters between Bocca Tigris forts and Canton. (Press Releases, Vol. XVII, No. 416.)

The international law governing reprisals—Four general rules.—The rules governing the conduct of reprisals and the relations between the contestants and third states have never been clearly developed, reprisals constituting an extremely foggy segment of international law. Out of the practice of reprisals both before 1914 and in these later days of "undeclared wars," certain general rules, however, do emerge. These are shadowy, it is true, and their listing is not in the least meant to be definitive. Four, however, can be discerned:

(1) The state engaging in reprisals is entitled to take those measures which are reasonably related to the end in view, and which do not interfere unreasonably with the rights of third states in what, after all, is still technically a state of peace. The meaning of the word "reasonable" is subject to legal determination. The law or the judge applying the law must take into account the fact that the state engaged in a reprisal partaking of the nature of force usually has a definite military or naval objective. Those acts which are connected with the attainment of this end must be condoned by third states to a certain extent; these latter must be prepared to permit some interference with their

normal peace time rights, and though they do not have to allow the exercise of belligerent rights, they must recognize some modification in the regular laws of peace. This principle may seem vague and abstract, but in concrete situations it is not too difficult to apply, for in these it is usually not impossible to make a compromise which grants the state applying force sufficient latitude for the attainment of its object but which does not destroy completely the rights of third parties. An example of such a compromise is to be found in pacific blockade, where the vessels of third states must identify themselves to ships of the blockading force. This adjustment of the needs of the military and naval forces of the state engaged in reprisals with the rights of third states is all-important, and its achievement along the lines of reasonable compromise is of paramount significance in any discussion of this topic.

(2) Despite the absence of formal agreement on this matter, there has been a distinct trend toward applying the laws of war to the conduct of hostilities between the parties in these non-war situations. The states engaged in the dispute are not belligerents but they have come to be regarded as being to some extent under the laws of belligerency. Where third states are concerned this means that the usual war-time doctrine of "military necessity" will be the criterion for the responsibility for damages committed by either contestant. In the Sino-Japanese conflict, for instance, it has been interesting to note how third powers, though not admitting the existence of war, have yet attempted to hold both Japan and China responsible for injuries as if there were a war. Foreigners' loss

of life and property have brought a demand for reparation whenever such loss has seemed unconnected with "military necessity."

(3) Contestants in a non-war use of force must therefore pay damages on a war basis, a rule obviously and immediately related to the one preceding. Sometimes in the past, damages have not been paid, as in the case of the bombardment of Greytown in 1854 (4 Court of Claims Report 543, *Perrin* v. *the United States*), but the failure of the United States in this instance does not constitute a precedent, for in many other cases payment has been made for damages which were not the result of the acutal needs of "warfare." In his article, "Responsibility for Damages to Persons and Property of Aliens in Undeclared War" (Proceedings of the American Society of International Law, 1938, pp. 127 to 140), Professor Clyde Engleton makes a thoroughgoing survey of the precedents on this point.

(4) Because there is no war in the legal sense, there is no neutrality during a period of reprisals. Third states accept inconvenience and interference, but they are not called upon to enforce neutral obligations, nor must they concede the full exercise of belligerent rights.

This enumeration of alleged rules may not really be law at all because the status of reprisals is basically so anomalous. On the one hand, there is legally peace and on the other, there is the employment of force which brings many war-like elements into the troubled picture. That the result legally is considerable confusion is not surprising, but a semblance of order may be maintained if reasonable compromises are made on the basis of the fore-

going outline. A stronger international law of peace and a better organized world of states would not tolerate such a hazy assemblage of alleged principles based upon a part-peace, part-war foundation, but for the present all that can be done is to salvage something in the way of order out of this unsatisfactory situation.

As above suggested, third parties have attempted to hold both Japan and China to the laws of war during the Far Eastern conflict. Both these powers seem to have admitted responsibility under the laws of war and have paid damages accordingly. The most notable instance of this is the case of the *Panay,* the full story of which is printed in the appendix to this volume. The Japanese paid the United States $2,214,007.36 for the sinking of the *Panay* (Press Releases, Vol. XVIII, No. 443, p. 410), while the Chinese Government paid the United States $264,887.47 as indemnification for personal injuries sustained as a result of the bombing of the S. S. *President Hoover* on August 30, 1937. (Press Releases, Vol. XIX, No. 468, p. 190.)

American attitude toward Japanese conduct of hostilities.—Since the renewal of the fighting between China and Japan in the Summer of 1937, the American Government, though never conceding that a formal war was in progress, has endeavored to call Japan to account as if the laws of war actually governed the situation. The American notes insist that the principles of the law of war are operative, e. g. in regard to bombing, and that damage or destruction are permissible only when "The objectives of Japanese military operations are limited strictly to Chinese military agencies and estab-

lishments." (See the next to the last paragraph of the American note printed immediately below.)

BOMBING OF NANKING

Upon instructions of the Secretary of State, the American Ambassador at Tokyo, Mr. Joseph C. Grew, delivered a note to the Minister for Foreign Affairs at Tokyo, September 22, 1937. The note read textually as follows:

"The American Government refers to the statement by the commander in chief of the Japanese Third Fleet which was handed to the American consul General at Shanghai on September 19 announcing the project of the Japanese Naval Air Force, after 12 o'clock noon of September 21, 1937, to resort to bombing and other measures of offense in and around the city of Nanking and warning the officials and nationals of third powers living there 'to take adequate measures for voluntary moving into areas of greater safety.'

"The American Government objects both to such jeopardizing of the lives of its nationals and of noncombatants generally and to the suggestion that its officials and nationals now residing in and around Nanking should withdraw from the areas in which they are lawfully carrying on their legitimate activities.

"Immediately upon being informed of the announcement under reference, the American Government gave instruction to the American Ambassador at Tokyo to express to the Japanese Government this Government's concern; and that instruction was carried out. On the same day the concern of this Government was expressed by the Acting Secretary of State to the Japanese Ambassador in Washington.

"This Government holds the view that any general bombing of an extensive area wherein there resides a large populace engaged in peaceful pursuits is unwarranted and contrary to principles of law and of humanity. Moreover, in the present instance the period allowed for withdrawal is inadequate, and, in view of the wide area over which Japanese bombing operations have prevailed, there can be no assurance that even in areas to which American nationals and noncombatants might withdraw they would be secure.

"Nothwithstanding the reiterated assurance that 'the safety of the lives and property of nationals of friendly

powers will be taken into full consideration during the projected offensive,' this Government is constrained to observe that experience has shown that, when and where aerial bombing operations are engaged in, no amount of solicitude on the part of the authorities responsible therefor is effective toward insuring the safety of any persons or any property within the area of such operations.

"Reports of bombing operations by Japanese planes at and around Nanking both before and since the issuance of the announcement under reference indicate that these operations almost invariably result in extensive destruction of noncombatant life and nonmilitary establishments.

"In view of the fact that Nanking is the seat of government in China and that there the American Ambassador and other agencies of the American Government carry on their essential functions, the American Government strongly objects to the creation of a situation in consequence of which the American Ambassador and other agencies of this Government are confronted with the alternative of abandoning their establishments or being exposed to grave hazards.

"In the light of the assurances repeatedly given by the Japanese Government that the *objectives of Japanese military operations are limited strictly to Chinese military agencies* and establishments and that the Japanese Government has no intention of making nonmilitary property and noncombatants the direct objects of attack, and of the Japanese Government's expression of its desire to respect the Embassies, warships, and merchant vessels of the powers at Nanking, the American Government cannot believe that the intimation that the whole Nanking area may be subjected to bombing operations represents the considered intent of the Japanese Government.

"The American Government, therefore, reserving all rights on its own behalf and on behalf of American Nationals in respect to damages which might result from Japanese military operations in the Nanking area, expresses the earnest hope that further bombing in and around the city of Nanking will be avioded." (Press Releases, Vol. XVII, No. 417.)

American property in areas of hostility.—

"I am instructed by my Government to bring to Your Excellency's attention reports and complaints from American residents that in the course of recent military operations at Nanking, Hangshow and other places the Japanese armed forces have repeatedly entered American property illegally and removed goods and employees and committed other acts of depredation against American property which has almost invariably been marked by American flags and by notices in English, Chinese and Japanese issued by the American authorities and setting forth the American character of the property concerned. According to these reports not only have Japanese soldiers manifested a complete disregard for these notices but they have also in numerous instances torn down, burned and otherwise mutilated American flags. I am directed to impress upon Your Excellency the seriousness with which my Government regards such acts and to convey its most emphatic protest against them. My Government finds it impossible to reconcile the flagrant disregard of American rights shown by Japanese troops as above described with the assurances contained in Your Excellency's note of December 24, 1937, that 'rigid orders have been issued to the military, naval and Foreign Office authorities to pay * * * greater attention than hitherto to observance of the instructions that have been repeatedly given against infringement of, or unwarranted interference with, the rights and interests of the United States and other third powers.'

"In view of the fact that a number of these acts are reported as having occurred subsequent to the receipt of the aforementioned assurances of the Imperial Japanese Government and inasmuch as this disregard of American rights is reported as still continuing, the American Government is constrained to observe that the steps which the Japanese Government have so far taken seem inadequate to ensure that hereafter American nationals, interests and property in China shall not be subjected to attack by Japanese armed forces or unlawful interference by any Japanese authorities or forces whatsoever. My Government must, therefore, request that the Imperial Japanese Government reenforce the

instructions which have already been issued in such a way as will serve effectively to prevent the repetition of such outrages."

(Note presented by Ambassador Joseph C. Grew to the Japanese Minister of Foreign Affairs, January 17, 1938, Press Releases, Vol. XVIII, No. 435.)

American property occupied by Japanese.—The American Ambassador to Japan, Mr. Joseph C. Grew, on May 31, 1938, addressed to the Japanese Minister for Foreign Affairs, under instruction from the Secretary of State, a note reading as follows:

"The problem of enabling American citizens in China to reenter and repossess their properties, from which they have been excluded by the Japanese military and of which the Japanese military have been and in some cases still are in occupation, is giving the Government of the United States increasing concern.

"An illustrative case is that of the property of the University of Shanghai, a large and valuable plant located at Shanghai in the Yangtzepoo district. This university has been engaged for many years in educational work and is jointly owned by the Northern and Southern Baptist Missionary Societies. The premises of the university have been under continuous occupation by Japanese military and naval units since shortly after the outbreak of hostilities at Shanghai in August 1937. It is understood that the premises have been used by the Japanese for quartering troops and for military offices, and a portion of the campus for stationing airplanes and supplementing the runway for airplanes on the adjacent golf course which has been converted by the Japanese into a military flying field. During the period of Japanese occupancy several buildings have been damaged and the majority looted. Japanese occupation of the property has continued for a period of nine months, notwithstanding *the fact that hostilities in this locality long ago ceased.* Repeated written and oral representations made by the American Embassy at Tokyo to the Japanese Government and by the American Consul General at Shanghai to

the Japanese authorities there have not so far resulted in bringing about restoration of the premises to the rightful owners. Recently, representatives of the Baptist missionary societies have stressed, on behalf of the six million Baptists in the United States, the urgent need for the return to their possession of this important missionary educational property.

"In various places in the lower Yangtze Valley American businessmen and missionaries have been prevented by the Japanese authorities from returning to their places of business and mission stations and are denied even casual access to their properties. The American Consul General at Shanghai has made applications for passes in behalf of several American firms with important interests in that area, in order to permit the representatives and employees of the firms to resume business there, but such applications have repeatedly been refused by the Japanese authorities on the ground that peace and order have not been sufficiently restored. This has been the case even when the applications were for visits for the purpose of brief inspection and checking of losses or for the purpose of taking steps to prevent further deterioration of their properties, including stocks and equipment, during their enforced absence. Many Japanese merchants and their families are known to be in the localities to which these Americans seek to return.

"American missionaries also have been prevented from returning to their stations in the lower Yangtze Valley. Certain mission properties in this region which were formerly under occupation by Japanese troops are now reported to have been vacated as a result of Japanese troop transfers, and the missionary societies concerned feel it highly important that their representatives reoccupy and preserve such properties. In view of the fact that Japanese civilians are freely permitted to go into and reside in such areas—as, for example, at Nanking where some eight hundred Japanese nationals, including a substantial number of women and children, are reported to be in residence—it is difficult to perceive any warrant for the continued placing by the Japanese authorities of obstacles in the way of return by Americans who have legitimate reason for proceeding to the areas in question.

"My Government is confident that the Japanese Government cannot but concede that the infringement of and interference with American rights in China by the Japanese authorities involved in the situation to which attention is herein brought are contrary to the repeated assurances of the Japanese Government that the American rights will be respected; that the Japanese Government will take immediate steps, in keeping with such assurances, to cause the return to their rightful owners of the premises of the University of Shanghai and other American property under the occupation of Japanese armed forces; and that the Japanese Government will issue instructions to have removed the obstacles interposed by the Japanese authorities in China against return by American nationals to places such as those mentioned in the areas under Japanese military occupation." (Press Releases, Vol. XVIII, No. 453.)

Airplanes and pacific blockade.—To date, there has not been a pacific blockade in which airplanes were employed, so that there are no precedents strictly applicable to the situation of the *Safa* in section (*a*) of this Situation. Applying the principles of maritime blockade, it would seem legal for the aircraft of state N to ask the *Safa* for identification. To do that would not be violating the peace-time rights of state S which could legally object to any further step amounting to visit and search. If the *Safa* refuses to comply with the request for identification, may the airplane use force? The treatises and precedents on this problem are exceedingly vague. In the view of the third party i. e. state S, any employment of force, even to secure identification, might seem to constitute an unwarrantable interference with its peaceful rights. But the objective of the blockading state must be kept in mind, and if unidentified vessels were allowed to pass the blockade, the entire measure of coercion might be placed in

jeopardy. It would be asking too much of the blockading state to forego measures of coercion against the ships of third states in all cases where identification could not be obtained. It does not seem unreasonable, therefore, to permit the application of force for the limited purpose of securing identity. To support this assertion there is the statement in Soule and McCauley, "International Law" page 50, "That States not Parties to the Pacific Blockade * * * cannot complain because they are required to establish their identity in the ordinary manner." In the Naval War College Situations, 1932, page 95, it is also asserted that "The blockading force may take such measures as are necessary for closing the port before which it is maintaining an effective blockade." This last statement is extremely broad, is liable to misinterpretation, and should not be taken as implying any rights over third party ships other than that of identification.

In Situation (*a*), therefore, the aircraft has no authority to order the freighter about if it has obtained identity. The command to lie to for 24 hours or until a cruiser of state N arrives to visit and search the *Safa,* is absolutely unjustified. Even were this a war-time situation, such tactics by an airplane encountering a surface vessel would appear to be illegal, as the discussion of Article 49 in the Jurists Report indicates.

What are the rights of a surface blockading squadron as against aircraft flying over a pacific blockade? Much the same type of reasoning is applicable here as that discussed immediately above. The *Noan,* the cruiser of state N, having the right to identify craft, acted legally in ordering the *T–21* to

land at a nearby airport in order that its identity and right to pass might be established. This involves deviation on the part of the airplane, but such deviation of aircraft is essential as discussed in Situation I. It is not lawful for an airplane to force a surface vessel to deviate, at least not yet, but an aircraft or surface vessel meeting an aircraft might well *have* to order deviation in order to effect its lawful purpose. To the possible objection that a blockade of the air maintained solely by surface ships could not constitute an effective blockade, it can be answered that surface vessels by their anti-aircraft guns are capable of making passage overhead extremely dangerous. Such a situation was definitely envisaged in Article 30 of the Jurists Report. In this case the fact that the *Noan* hit the *T–21* proves the effectiveness of the blockade in fact.

For state N to allow the flight of unidentified airplanes over its blockade might well prove extremely risky and to ask a vessel of state N to withhold fire in such cases would not make sense. The order of the *Noan* to the *T–21* was not unreasonable. Airplanes are difficult to identify in the air, and military and commercial craft nowadays look very much alike. As the landing field was nearby, no great inconvenience was being asked of the *T–21* which should have complied with the order. To the possible claim that the situation was not sufficiently serious to warrant the firing upon a plane which in all likelihood would be seriously damaged if hit, the answer is the same as that given in Situation I. The pilot of the plane took his chances and must suffer the consequences. As was stated in the case of *United States* v. *Diekelman* (92 U. S. 520), "She voluntarily as-

sumed the risks of her hazardous enterprise and must sustain the losses that follow * * * (She) ought to have known they kept the port closed to the extent necessary for the vigorous prosecution (of the war)." Therefore, assuming that the *Noan* was really unaware of the *T–21's* identity, and assuming further that a proper communications code was in effect (problem discussed in Situation I) so that the *T–21* could reasonably be presumed to be aware of the summons, the initial firing by the *Noan* was lawful. This decision is based upon the previously mentioned principle that the blockading state may make reasonable interference with the rights of third parties for the attainment of its objective, the term "reasonable" being capable of interpretation in the light of the facts of an actual situation.

The firing upon the *T–21* after it had been forced to land, was not justified. It was an excessive use of force which was not necessary for military purposes, and the *Tafu* should take energetic steps to protect the *T–21* from further damage. The right of self-preservation is here brought into play.

Article 723 of U. S. Navy Regulations, 1920.—The use of force against a foreign and friendly state, or against anyone within the territories thereof, is illegal.

The right of self-preservation, however, is a right which belongs to states as well as to individuals, and in the case of states it includes the protection of the state, its honor, and its possessions, and the lives and property of its citizens against arbitrary violence, actual or impending, whereby the state or its citizens may suffer irreparable injury. The conditions calling for the application of the right of self-preservation cannot be defined beforehand, but must be left to the sound judgment of responsible officers, who are to perform their duties in this respect with all possible care and forbearance.

In no case shall force be exercised in time of peace otherwise than as an application of the right of self-preservation as above defined.

It must be used only as a last resort, and then only to the extent which is absolutely necessary to accomplish the end required. It can never be exercised with a view to inflicting punishment for acts already committed.

General principle involved.—It cannot be repeated too often that in non-war situations of force both the contestants and third states must base their actions upon the compromise principle of "reasonable interference." The application of this principle makes for the avoidance of controversy in a realm where specific rules are almost wholly absent. Though the laymen may feel that the bringing in of the word "reasonable" adds little clarity, students of the law know that courts and judges constantly have to deal with such matters as "reasonable risk" and "reasonable man." These words acquire definite meaning when employed in actual situations. They are legal terms judicially interpreted. In International Situations like those here under discussion, sensible men do not and will not find it unduly difficult to decide what is "reasonable" when the legitimate needs of the state engaging in force meets the equally legitimate right of a third state under the international law of peace. The principle may again be summarized, this time in the words of Professor Ellery C. Stowell (International Law, p. 555).

Quasi-neutrals must tolerate such modifications of the usual relations as are reasonably necessary to apply the justifiable measures of reprisal and to effect the legitimate purpose in view.

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Nonmilitary occupation and extraterritoriality.—In the past there have been many occupations of territory when no war has been declared. In occupations of this sort the usual rules regulating a military occupant's conduct have been held to apply. Though occupation, either "pacific" or military is more than invasion and gives to the occupant certain rights including that of securing the obedience of the local population, it does not operate to transfer title to the land involved, or to terminate treaties. (See Note by Lester Woolsey, American Journal of International Law, April 1938, p. 319.)

American attitude toward Japanese occupation of China.—Following is the text of a letter from the Secretary of State to Senator William H. Smathers:

DECEMBER 18, 1937.

MY DEAR SENATOR SMATHERS: I have received your letter of December 13, 1937, in which you inform me that you favor the withdrawal of American ships and citizens from the area affected by the present conflict in the Far East.

The question of the types and degrees of protection which this Government should afford to its citizens abroad presents many difficulties and is one in regard to which opinions may very readily differ. In a situation such as has prevailed in the Far East there have been developed during more than a century certain rights, certain interests, certain obligations and certain practices. In the light of peculiar features inherent in the situation, all of the major powers have developed and employed, with authorization by the Chinese Government, methods for safeguarding the lives and interests and property of their nationals believed to be appropriate to the situation and warranted by the peculiarities thereof. Thus, for instance, there came about and there is still in existence the system of extraterritorial jurisdiction and various of its concomitants. Concurrently, many nationals of this and other countries have, during several generations,

gone to China, established themselves there in various occupations and activities, and subjected themselves both to the advantages and to the disadvantages of the conditions prevailing there, and the American Government has, along with other governments, accepted various rights and incurred various obligations. In a situation such as now prevails, many of our nationals cannot suddenly disavow or cut themselves off from the past nor can the American Government suddenly disavow its obligations and responsibilities. The American naval vessels and the small contingents of American landed forces which have been maintained in China were placed and have been kept there solely for the purpose of assisting in the maintenance of order and security as affecting the lives, the property and the legitimate activities of American nationals, especially in regard to conditions of local disorder and unauthorized violence. These vessels and troops have never had in any sense any mission of aggression. It has long been the desire and expectation of the American Government that they shall be withdrawn when their appropriate function is no longer called for. We had thought a few months ago that the opportune moment for such a withdrawal was near at hand. The present, however, does not seem an opportune moment for effecting that withdrawal.

Officers of the American Government have repeatedly and earnestly advised American citizens, in face of dangers incident to residence in China, to withdraw and are making every effort to provide safe means whereby they may depart. During the current situation in China the American military and naval forces have rendered important service in protecting the lives of American nationals, in assisting in evacuating Americans from areas of special danger, and in making possible the maintenance of uninterrupted communications with our nationals and our diplomatic and consular establishments in the areas involved.

As of possible interest in this connection there is enclosed a press release issued by the Department on August 23, 1937, outlining the policy on which the Government is proceeding with reference to the situation in the Far East.

I am very grateful for your courtesy in bringing to my attention your views in regard to the situation in the Far

East, and I assure you that we welcome at all times thoughtful views and comment on any phase of our foreign relations.

Sincerely yours,

CORDELL HULL.

(Press Releases, Vol. XVII, No. 430.)

At various times during recent decades various powers, among which have been Japan and the United States, have had occasion to communicate and to confer with regard to situations and problems in the Far East. In the conducting of correspondence and of conferences relating to these matters, the parties involved have invariably taken into consideration past and present facts and they have not failed to perceive the possibility and the desirability of changes in the situation. In the making of treaties they have drawn up and have agreed upon provisions intended to facilitate advantageous developments and at the same time to obviate and avert the arising of friction between and among the various powers which, having interests in the region or regions under reference, were and would be concerned.

In the light of these facts, and with reference especially to the purpose and the character of the treaty provisions from time to time solemnly agreed upon for the very definite purposes indicated, the Government of the United States deprecates the fact that one of the parties to these agreements has chosen to embark—as indicated both by action of its agents and by official statements of its authorities—upon a course directed toward the arbitrary creation by that power by methods of its own selection, regardless of treaty pledges and the established rights of other powers concerned, of a "new order" in the Far East. Whatever may be the changes which have taken place in the situation in the Far East and whatever may be the situation now, these matters are of no less interest and concern to the American Government than have been the situations which have prevailed there in the past, and such changes as may henceforth take place there, changes which may enter into the producing of a "new situation" and a "new order," are and will be of like concern to this Government. This Government is

well aware that the situation has changed. This Government is also well aware that many of the changes have been brought about by action of Japan. This Government does not admit, however, that there is need or warrant for any one power to take upon itself to prescribe what shall be the terms and conditions of a "new order" in areas not under its sovereignty and to constitute itself the repository of authority and the agent of destiny in regard thereto.

It is known to all the world that various of the parties to treaties concluded for the purpose of regulating contacts in the Far East and avoiding friction therein and therefrom—which treaties contained, for those purposes, various restrictive provisions—have from time to time and by processes of negotiation and agreement contributed, in the light of changed situations, toward the removal of restrictions and toward the bringing about of further developments which would warrant, in the light of further changes in the situation, further removals of restrictions. By such methods and processes, early restrictions upon the tariff autonomy of all countries in the Far East were removed. By such methods and processes, the rights of extraterritorial jurisdiction once enjoyed by occidental countries in relations with countries in the Far East have been given up in relations with all of those countries except China; and in the years immediately preceding and including the year 1931, countries which still possess those rights in China, including the United States, were actively engaged in negotiations—far advanced—looking toward surrender of those rights. All discerning and impartial observers have realized that the United States and other of the "treaty powers" have not during recent decades clung tenaciously to their so-called "special" rights and privileges in countries of the Far East but on the contrary have steadily encouraged the development in those countries of institutions and practices in the presence of which such rights and privileges may safely and readily be given up; and all observers have seen those rights and privileges gradually being surrendered voluntarily, through agreement, by the powers which have possessed them. On one point only has the Government of the United States, along with several other governments, insisted: namely, that new situations must have developed to a

point warranting the removal of "special" safeguarding restrictions and that the removals be effected by orderly processes.

The Government of the United States has at all times regarded agreements as susceptible of alteration, but it has always insisted that alterations can rightfully be made only by orderly processes of negotiation and agreement among the parties thereto.

The Japanese Government has upon numerous occasions expressed itself as holding similar views.

The United States has in its international relations rights and obligations which derive from international law and rights and obligations which rest upon treaty provisions. Of those which rest on treaty provisions, its rights and obligations in and with regard to China rest in part upon provisions in treaties between the United States and China. and in part upon provisions in treaties between the United States and several other powers, including both China and Japan. These treaties were concluded in good faith for the purpose of safeguarding and promoting the interests not of one only but of all of their signatories. The people and the Government of the United States cannot assent to the abrogation of any of this country's rights or obligations by the arbitrary action of agents or authorities of any other country.

The Government of the United States has, however, always been prepared, and is now, to give due and ample consideration to any proposals based on justice and reason which envisage the resolving of problems in a manner duly considerate of the rights and obligations of all parties directly concerned by processes of free negotiation and new commitment by and among all of the parties so concerned. There has been and there continues to be opportunity for the Japanese Government to put forward such proposals. This Government has been and it continues to be willing to discuss such proposals, if and when put forward, with representatives of the other powers, including Japan and China, whose rights and interests are involved, at whatever time and in whatever place may be commonly agreed upon.

Meanwhile, this Government reserves all rights of the United States as they exist and does not give assent to any impairment of any of those rights.

JOSEPH C. GREW.

(Note to the Japanese Minister for Foreign Affairs, December 31, 1938. Press Releases, Vol. XIX, No. 483.)

I desire also to call Your Excellency's attention to the fact that unwarranted restrictions placed by the Japanese military authorities upon American nationals in China—notwithstanding the existence of American treaty rights in China and the repeated assurances of the Japanese Government that steps had been taken which would insure that American nationals, interests, and properties would not be subject to unlawful interference by Japanese authorities—further subject American interests to continuing serious inconvenience and hardship. Reference is made especially to the restrictions placed by the Japanese military upon American nationals who desire to reenter and reocccupy properties from which they have been driven by the hostilities and of which the Japanese military have been or still are in occupation. Mention may also be made of the Japanese censorship of and interference with American mail and telegrams at Shanghai, and of restrictions upon freedom of trade, residence and travel by Americans, including the use of railways, shipping, and other facilities. While Japanese merchant vessels are carrying Japanese merchandise between Shanghai and Nanking, those vessels decline to carry merchandise of other countries, and American and other non-Japanese shipping is excluded from the lower *Yangtze on the grounds of military necessity.* Applications by American nationals for passes which would allow them to return to certain areas in the lower Yangtze Valley have been denied by the Japanese authorities on the ground that peace and order have not been sufficiently restored, although many Japanese merchants and their families are known to be in those areas.

(From the American Note to Japan, October 6, 1938. Press Releases, Vol. XIX, No. 474, p. 285.)

"Four. Concerning the return of American citizens to the occupied areas, Your Excellency is aware that in North China there is no restriction, excepting in very special cases where the personal safety of those who return would be endangered, while in the Yangtze Valley large numbers of Americans have already returned. The reason why permission to return has not yet been made general is, as has been repeatedly communicated to Your Excellency, due to the danger that persists because of the imperfect restoration of order and also to the impossibility of admitting nationals of third powers on account of strategic necessities such as the preservation of military secrets. Again, the various restrictions enforced in the occupied areas concerning the residence, travel, enterprise and trade of American citizens, constitute the minimum regulations possible consistent with military necessities and the local conditions of peace and order. It is the intention of the Japanese Government to restore the situation to normal as soon as circumstances permit.

"Five. The Japanese Government were surprised at the allegation that there exists a fundamental difference between the treatment accorded to Japanese in America and the treatment accorded to Americans in Japan. While it is true that in these days of emergency Americans residing in this country are subject to various economic restrictions, yet these are, needless to say, restrictions imposed not upon Americans alone but also on all foreigners of all nationalities as well as upon the subjects of Japan. I beg to reserve for another occasion a statement of the views of the Japanese Government concerning the treatment of Japanese subjects in American territory, referred to in Your Excellency's note.

"As has been explained above, the Japanese Government, with every intention of fully respecting American rights and interests in China, have been doing all that could possibly be done in that behalf. However, since there *are in progress at present in China military operations on a scale unprecedented in our history*, it may well be recognized by the Government of the United States that it is unavoidable that these military operations should occasionally present obstacles to giving full effect to our intention of respecting the rights and interests of American citizens."

(From the Japanese reply, November 18, 1938, to the preceding note. Press Releases, Vol. XIX, No. 477, p. 352.)

Rules of "pacific" occupation.—As with measures of force short of war in general, very few specific regulations exist concerning "pacific" occupation, but certain lines of conduct emerge from an analysis of past measures of this sort:

(1) The coerced state retains title to the territory occupied and no legal change in sovereignty occurs without a definite treaty or without the workings of the principle of prescription.

(2) The occupant in his jurisdiction is limited to the right of garrison and of securing the safety of his troops on the territory occupied. This is fairly extensive jurisdiction, however, for naturally the occupying authorities in looking after the security of their troops will have to assume a large measure of control.

The problem, then, is to balance the interests involved, those of the occupant against those of third states and of the occupied state. As with military occupation, the local rules should continue in force "as far as possible," that is, as far as the safety of the military forces allows. This state of affairs is prescribed by Article 48 of Hague Convention IV, of 1907, Respecting the Laws and Customs of War on Land, and in Article VI of the Instructions for the Government of Armies of the United States in the Field (1863), which reads:

> All civil and penal law shall continue to take its course * * * under martial law * * * unless * * * stopped by order of the occupying military power.

In an occupied area there are thus two parallel legal systems. The occupant applies his own law in all cases of crime committed by his own officers

and men, in all cases of crimes against the army of occupation by any one in the area, and in all cases of war crimes involving illegal attempts to interrupt lines of communication, to demolish bridges, to obstruct traffic, etc. The primordial right of self-protection gives the occupant this necessary jurisdiction. In an exhaustive treatise, "Des Occupations Militaires en dehors Occupations de Guerre" (Paris, 1913) by Raymond Robin, will be found a complete survey of the problems involved in "pacific" occupation.

(3) When the two jurisdictions come into collision, that of the occupant necessarily has priority. This conclusion is based upon the practice followed in the pre-war instances of occupation. In many of these, the occupying power clashed with the rights of third states established in extraterritoriality conventions. The occupant in each instance gave consideration to the stipulations of these treaties, but at certain times felt obliged because of military requirements to override the treaty rights. The occupation in itself, it should be remembered, did not abrogate these treaties which remained in force until arranged for by further negotiation.

Occupation and extraterritoriality — Precedents.—The French in Morocco in 1907 declared "the fact of occupation cannot modify in any manner the rules of procedure established by treaty, * * * at least in regard to infractions *which do not directly concern the security of the occupying troops.*" (Robin op. cit., p. 546.) The famous Casablanca arbitration of 1909 involved a conflict between French troops and the German consular regime. Though the arbitral court rendered a Solomon-like award which endeavored to

placate both parties, the result really was favorable to the French whose military needs were recognized as taking precedence over all others. The court stated that it was wrong for the German Consul not to recognize—

> the rights of exclusive jurisdiction which appertain to the occupying state in foreign territory, as well as in countries under capitulations, as regards the soldiers of the army of occupation, and the actions whatever they may be or from wherever they may come which are of a nature to compromise its safety. (Deserters at Casablanca, G. G. Wilson, "The Hague Arbitration" Cases, p. 91.)

Likewise in the occupation of Tunis in 1881, the French tried some Italians who were urging violence in the military courts and refused to turn them over to the Italian consul who, the French alleged, would free them. (Robin op. cit., p. 671.) During the occupation of Crete by an international army in 1897, the military commanders were given complete jurisdiction over all offenses against the army, and Great Britain proclaimed the same rule when Cyprus was occupied in 1878. An American was held under French military jurisdiction in Madagascar in 1895, despite the provisions of the 1881 consular treaty between the United States and Madagascar. A final example of this rule of priority for the occupying forces is to be found in Bismarck's instructions to the German Consul in Samoa in 1889 when he declared that the occupant had the right to defend himself by force against any threat to his safety. As summed up by Robin (*ibid.*, p. 670) "In Capitulations countries, the military jurisdiction is competent for all attacks on the security of the army of occupation."

Application to the problem.—Though the forces of state N have occupied a large slice of state M,

the fundamental juridical status of the area has not changed. Titles still belong to state M and the extraterritoriality treaty between state M and state T is still in force. The local laws of state T remain in effect insofar as they are not inconsistent with the military needs of state M. The latter's rule is primary in all matters affecting the safety of its troops. If the nationals of state T had committed a crime or an act against the occupant, there would be no doubt as to the correctness of state N's position were that power to try the nationals in its military courts. In the problem presented, however, the nationals concerned are accused of crime against citizens of state M and thus would seem to be eligible for trial by their own consul under the treaty, the security of N's forces apparently not being involved. It is a jurisdictional dispute which ought to be a matter of negotiation between states T and N. It is therefore primarily a diplomatic and not a naval problem.

The Commander of the *Tafu* should remain close at hand, keeping in touch with the situation, and should notify the consul that he is ready to give protection if the lives of the state T nationals are placed in jeopardy. He should not issue any provocative demands upon the N authorities. The situation does not warrant such a drastic step which might involve state T in a difficult and embarrassing episode. Naval commanders should deal with local authorities through their own accredited consular and diplomatic representatives, and should threaten or use force in foreign countries only as a last resort dictated by the demands of self-defense.

On occasions where injury to the United States or to citizens thereof is committed or threatened, in violation of the principles of international law or treaty rights, the commander in chief shall consult with the diplomatic representative or consul of the United States, and take such steps as the gravity of the case demands, reporting immediately to the Secretary of the Navy all the facts. The responsibility for any action taken by a naval force, however, rests wholly upon the commanding officer thereof. (U. S. Navy Regulations, Rule 722.)

Résumé.—When states employ force against one another in time of peace, whether such measures be called reprisals or something else, international law is confronted with one of its most serious and difficult problems. The laws of war and neutrality cannot be made to apply in their entirety because technically a state of peace still reigns. The peace is a disturbed one, however, the contestants taking on some of the aspects of belligerents and third states becoming in reality quasi-neutrals. The terminology is apt to be very confusing because the legal situation itself is so muddled. The problems arise as a result of the absence of an organized international government which would decide questions of damages, and which would supervise law enforcement. Due to the lack of such a government, states have been in the habit of taking the law into their own hands under the theory of "self-help" which permits coercion when legally an injury has been received. In practice, the Great Powers, the only states which had effective force at their disposal, have abused the theory and have engaged in measures short of war against weaker nations ostensibly under the guise of law enforcement, but actually for political ends.

The weaker powers in such situations have usually not cared or been able to regard such measures as instituting a legal state of war. As a result, considerable practice has accumulated involving the procedures and tactics followed in these "force in peace" relationships. Unable to control the political use of force, international lawyers have accepted the practice and have formulated a few rules governing the de facto use of force. Since the framing of the League of Nations Covenant and the ratification of the Pact of Paris (Kellogg-Briand Treaty) the problem has continued to be an acute one. States using military and naval force against other powers have been reluctant to term their actions "war" because such a declaration would seem to identify them as violators of treaties which renounced or put restrictions upon the going to war. Since 1920 the only occasion upon which a participant in an international struggle has admitted that war was in progress was in 1933 when on May 10th of that year Paraguay formally declared war on Bolivia. None of the actual contestants in the Sino-Japanese or the Italo-Ethiopian conflicts has admitted a war status, though during the latter embroglio the American President "found" a war and most of the members of the League decided that Italy had "resorted to war" in violation of the Covenant.

Governing these non-war situations there is very little in the way of specific rules. Certain general principles, however, are applicable, and though these may seem inconsistent with the laws of peace and not in harmony with what many may regard as the proper ends of law, they must be accepted for the time being for lack of anything better. The

most important of these general principles is that which specifies that the state employing force may interfere with the rights of third states to an extent reasonably necessary for the attainment of the military or naval objective. Quasi-neutrals must accept some inconvenience. Examples of this necessary compromise between the interests of the force-employing state and third parties is the right of the former to identify all vessels and aircraft crossing a pacific blockade and the further right to use force to supplement this right of identification. Such an adjustment affords the blockading state an adequate opportunity to pursue its objective and yet does not accord it the complete belligerent rights of visit and search. A state using such measures cannot expect all the advantages of belligerency if it is unwilling to assume its obligations. The right of identification is a reasonable compromise for a non-war operation.

In military occupation on land, when no war status exists, a similar balancing of interests is possible. The occupant inevitably has priority in all matters relating to the security of its forces, but such rights do not include a termination of treaties or a complete suppression of the local laws. The guiding word in all this is "reasonable" which, though vague in the abstract, is capable of sensible interpretation in actual situations.

SOLUTION

(*a*) If the airplane is still with the *Safa,* the commander of the *Sogu* should direct the *Safa* to lie to, should proceed to the *Safa* to protect it, and should notify the commander of the N forces that the *Safa* is a vessel of state S and is not to be

molested, identification being all that the *Safa* is legally required to furnish the airplane. If the airplane has left the *Safa,* the *Sogu* should direct the latter to proceed into the port, and, if deemed essential for the protection of the *Safa,* the *Sogu* should accompany it into the port.

(*b*) The commander of the *Tafu* should warn the *Noan* that if the latter continues to fire upon the *T–21,* he will fire upon the *Noan* to force it to desist. He should attempt to interpose the *Tafu* between the *Noan* and the airplane with the object of halting the firing and should send out a small boat to rescue the survivors of the *T–21.*

(*c*) The commander of the *Tafu* should consult with the consul of state T at Mount and should report the incident to his superiors in the Navy Department. A demand for the return of the nationals of state T or a threat of the use of force on the part of the commander of the *Tafu* would not be warranted by the facts of this situation. As long as no immediate threat to the lives and property of state T nationals is involved, the matter is one for diplomatic negotiation between states T and N.

Situation III

INSURGENCY AND CIVIL STRIFE—PROTECTION OF SHIPS OF THIRD STATES

There is in state B an armed attempt of party C, the Commoners, to obtain control of the established government of state B and the Commoners have obtained military control of one-half of state B and the ports in that area. Armed vessels of state B and of the Commoners are cruising off the coast. Vessels of war of other states are also cruising off the coast under instructions to maintain the rights of their nationals. Such provisions as those of the Non-Intervention Scheme of Observation, March 8, 1937, bind states D, E, F, and G. Such provisions as those of the Joint Resolution of the United States, May 1, 1937, bind states F, G, H, and I, and states D, E, H, and I were bound by the Nyon Agreement of September 14, 1937. All states were parties to the submarine warfare rules of 1930.

(*a*) The *Feran,* a merchant vessel, lawfully flying the flag of state F, bound for port R, which is under the control of state B, with a cargo of unassembled aircraft parts, is met 10 miles off the coast by the *Cape,* a cruiser flying the flag of the Commoners. The *Cape* sends a small boat with three men toward the *Feran* after it had summoned the *Feran* to come to and to submit to capture on the ground that this action is in accord with the Joint Resolution of May 1, 1937. The *Feran* asks by radio

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for instructions or aid from the *Fona,* a nearby cruiser of state F. 1. What are the legal rights? 2. Would the rights be the same if the summons had been by a cruiser of state B?

(*b*) The *Iris,* a merchant vessel lawfully flying the flag of state I, with a cargo of barbed wire, is met by a submarine which does not disclose its identity, but orders the crew to take to the boats and row to fishing vessels which are in the vicinity as the *Iris* will be sunk after ten minutes. The *Iris* asks by radio for instructions or aid from the *Iona,* a nearby cruiser of state I. 1. What are the legal rights? 2. Would the rights be the same if the submarine had been under the flag of the Commoners? 3. Would the rights be the same if the submarine had been under the flag of state D?

(*c*) The *Gyra,* an oil tanker lawfully flying the flag of state G, armed "for the preservation of discipline," is met 10 miles off the coast by the *Bain,* a cruiser of state B. The *Bain* summons the *Gyra* to come to for visit and search and as the small boat from the *Bain* comes alongside, the crew of the *Gyra* drive it off with the arms on board. The *Bain* then signals that it is about to sink the *Gyra.* The *Gyra* asks by radio for instructions or aid from the *Geno,* a nearby cruiser of state G. 1. What are the legal rights? 2. Would the rights be the same if the summons was by a cruiser of the Commoners?

In each of the above cases should a nearby cruiser of state H take any action if specially requested by the merchant vessels?

SOLUTION

(*a*) The *Fona* should notify the *Feran* that it is coming to its aid to protect it against an illegal act.

The *Fona* also should notify the *Cape* that the latter has no right to interfere with the *Feran* and should threaten the use of force against the *Cape* if it refuses to desist. The rights would be the same if the summons had been by a cruiser of state B.

(*b*) The *Iona* should notify the *Iris* to try to escape and should notify the submarine that it has no rights in this situation and that force will be used against it for the protection of the *Iris*. If the *Iona* arrives before the *Iris* is actually attacked it should drive off the submarine by force, and if it reaches the place of attack too late to save the *Iris,* it should counter-attack the submarine. The rights would be the same if the submarine had been under the flag of the Commoners or that of state D.

(*c*) The *Geno* should notify the *Gyra* to cease its resistance and should notify the *Bain* that the latter has no right either to visit and search or to sink the *Gyra* and should threaten force to compel it to desist. The rights would be same if the summons was by a cruiser of the commoners.

The cruiser of state H should take no action in the case of the *Feran*. In the case of the *Iris* it may intervene and may counter-attack and destroy the submarine. In the case of the *Gyra,* if it witnesses the attack, it may intervene to protect the *Gyra* but has no authority to counter-attack or destroy the *Bain*.

The Spanish Civil Strife—General.—The situation in state B where the Commoners are engaged in an attempt to obtain control of the established government is obviously very similar to the legal state of affairs prevailing in Spain from July 1936 to 1939. The regular rules of belliger-

ency do not apply, for no war exists in the legal sense. Technically it is a condition of insurgency only. Third states are not subject to the obligations of neutrality under general international law and the two contestants do not possess belligerent rights. In both the Spanish case and in this Situation III, however, outside powers have adopted special measures which have no precedent in international law. The effect of these acts is to put the two parties upon the same basis, treating them both alike. In operation, therefore, these special provisions, in principle, are akin to neutrality. The result has been highly anomalous, for third states have assumed an attitude of impartiality and have taken upon themselves certain obligations when there was really no war, no call for neutrality, and when under normal circumstances the established, recognized government would be entitled to friendly support as prescribed by the laws of peace. Solution to the problems must be sought upon the basis of the usual rules of insurgency and the particular conventions and regulations adopted for this conflict. The words "civil strife" have been used advisedly since "civil war" would imply the existence of a state of belligerency, a legal condition recognized neither in Spain nor in state B.

Maritime rules during insurgency.—During insurgency neither the government nor the insurgent forces have the right to visit and search ships of third states or to make seizures on the customary grounds of contraband, blockade and unneutral service. Within territorial waters both parties may prevent supplies from reaching their opponent. This right of barring access gives no au-

thority to seize or destroy foreign ships. The insurgent or government cruiser in such cases may direct the ship to a certain port where the supplies may be seized or may remove them from the ship provided compensation is rendered.

This subject of the rights of the parties in insurgency has frequently been discussed in Naval War College Situations, the most famous of these being that of 1902 when the fundamental principles were laid down.

> No right of confiscation or destruction of foreign property in such circumstances (in territorial waters) could well be recognized and any act of injury so committed against foreigners would necessarily be at the risk of insurgents * * * their only right being * * * to prevent the access of supplies to their domestic enemy. The exercise of this power is restricted to the precise end to be accomplished. (Naval War College Situation, 1902, p. 80.)
>
> Insurgents actually having before the port of the state against which they are in insurrection, a force sufficient, if belligerency had been recognized, to maintain an international law blockade, may not be materially able to enforce the conditions of a true blockade upon foreign vessels upon the high seas, even though they be approaching the port. Within the territorial limits of the country, their right to prevent the access of supplies to their enemy is practically the same on water as on land—a defensive act in the line of hostility to the enemy. (*Ibid*, p. 82.)
>
> So far as territorial waters are concerned, both the de jure and the de facto governments are entitled to take defensive measures within the waters adjoining the coast which they respectively occupy, but any such action is taken entirely under the municipal law and has nothing whatever to do with belligerent rights. (British Yearbook of International Law, 1937, p. 27.)

Position of third states during insurgency.—When legally there is no war, third states are not neutral, and the governments of third states are

governed by the customary laws of peace in their relation with the established government. Foreign governments, therefore, may legally sell arms to the recognized government but may not do so to the insurgents, for such an act would be tantamount to intervention. The existence of insurgency rather than belligerency tends to be more favorable to the constituted authorities than to the revolutionists. This is logical enough considering the fact that peace still prevails. The Havana Convention of 1928 on Rights and Duties of States in Civil Strife formally recognizes this favoring of the regular government.

> ARTICLE 1. The contracting states bind themselves * * * to forbid the traffic in arms and war material, except when intended for the government, while the belligerency of the rebels has not been recognized, in which latter case the rules of neutrality shall be applied.
>
> ARTICLE 3. The insurgent vessel, whether a warship or a merchantman, equipped by the rebels, which arrives at a foreign country or seeks refuge therein, shall be delivered by the government of the latter to the constituted government of the state in civil strife. (U. S. Treaty Series, No. 814.)

Unless there is a domestic law to the contrary, private persons may sell arms and supplies, at their own risk, to either side in cases of insurgency. The obligations of neutrality come into the picture only when a state like the United States forbids the fitting out and arming of expeditions on behalf of either contestant. (The Three Friends, 166 U. S. 1.) To this limited extent, where expeditions are involved, third states are really neutral.

Insurgency and blockade.—It has long been clear that neither the government nor the rebel forces has the right to establish a blockade as long as there is only insurgency. The parent government may

declare certain ports closed but must enforce that order by effective means within the three mile limit. What may look, therefore, like a regular blockade, is legally only an act of enforcement for a domestic decree. The rights of third states upon the high seas are unaffected. It has been held that such closures must be "effective," the criterion of a belligerent blockade thus appearing somewhat paradoxically in what is technically a peacetime situation. (See Oriental Navigation Co. Claim, U. S.-Mexico General Claims Commission, 1928, Opinions of Commissioners, 1929, p. 23.)

This rule that parent state orders of closure must be enforced is a midway measure between two other possibilities. One of these would be that the parent state could close a port by simple decree, just as it could if there were no revolt, without any requirement that the order be supported by effective force. Some who reject this proposition contend that if the parent government wishes to prevent access to ports held by revolutionists, it must recognize the belligerency of the opposition, that is, the peculiar status of a blockade which is not a blockade should be discarded. Practice however, is still along the lines of "effective" closure without belligerency. (For a clear discussion of these matters see H. Briggs, "The Law of Nations," pp. 745–749.)

Blockade in the Spanish civil strife.—Early in the conflict, the Spanish "Loyalist" government declared that certain ports in the hands of the rebels constituted a "war zone." In its reply to this announcement the American government stated that it could not admit the legality of such action unless the Spanish government maintained

an "effective" blockade. The legal lines in this situation were not clear. Was the Spanish Government issuing a closure order in the usual sense discussed above? It declared a "war zone" but the United States replied in terms of a blockade. If the government decree was a real blockade order, then it should have been treated as a recognition of belligerency as was Lincoln's blockade measure in 1861. (The Prize Cases, 2 Black 635.) If it was not a blockade order, the United States should have answered in terms of the customary closure rules. The normal legal distinctions were thus blurred, a situation far from unusual in the whole story of the Spanish strife.

Could General Franco, the insurgent, "blockade" Loyalist ports? By their actions outside powers admitted that he could intercept and interfere with the commerce of third states within the 3-mile limit. This was true both at Bilbao and at Barcelona, and his actions there were in conformity with those usually allowed to insurgents, as described in connection with the Naval War College Situation of 1902 above.

On August 21 Mr. Eric C. Wendelin, in charge of the American Embassy in Madrid, received a note verbale, dated August 20, 1936, from the Spanish Foreign Office at Madrid which stated:

"Spanish ports in the power of the rebels as well as those of Ceuta and Melilla and the ports of our proscription zone in Morocco, Balearic and Canary Islands, have all been declared a war zone and therefore it is not possible for the ships of our fleet to permit the entry into them of merchant ships in order in this way to prevent furnishing of provinces of Almería, Murcia, Alicante, and Badajoz and supplies to the rebels."

The Spanish Foreign Office requested that this information be transmitted to the American Government in order that

American merchant ships may be warned and that thus "possible incidents may be avoided."

Mr. Wendelin reported that he believed that the same communication had been sent to all other governments.

The Secretary of State, on August 25, instructed Mr. Wendelin to address the following note to the Minister of State in reply to the Minister's note verbale of August 20:

"Sir:

"I have the honor to acknowledge the receipt of your note of August 20, 1936, requesting me to inform my Government, in order that American merchant ships might be warned and possible incidents thus avoided, that your Government has declared Spanish ports in control of the insurgents, both on the Spanish mainland and in Morocco and the Balearic and Canary Islands, a war zone into which merchant vessels will not be permitted to enter.

"My Government directs me to inform you in reply that, with the friendliest feelings toward the Spanish Government, it cannot admit the legality of any action on the part of the Spanish Government in declaring such ports closed unless that Government declares and maintains an effective blockade of such ports. In taking this position my Government is guided by a long line of precedents in international law with which the Spanish Government is doubtless familiar." (Press Releases, Vol. XV, No. 361.)

November 17, 1936, General Franco announced his intention of stopping the traffic in arms and munitions to Barcelona. His note to the Powers said:

"The scandalous traffic in arms, ammunition, tanks, airplanes, and even toxic gases, which is being carried on through the port of Barcelona is well known. All this material is being transported to this port in ships flying different flags whose real nationality in its greater part is Russian or Spanish.

"The National Government, being resolved to prevent this traffic with every means of war at its disposal will even go so far, if this were necessary, as to destroy that port.

"Therefore, it warns all foreign ships anchored in that harbor of the desirability of abandoning it in a very short time to avoid the consequences of damage which, unintentionally, might be caused to them on the occasion of the military action referred to of which no further warning will be given." (London Times, Nov. 20, 1936.)

Insurgent vessels and piracy.—Despite the court decision in the famous case of the Ambrose Light (25 F. 408) in the last century, insurgent craft on the high seas or in territorial waters are not pirates.

The declaration of piracy against vessels which have risen in arms, emanating from a government, is not binding upon the other states. (Habana Convention 1928, op. cit., Art. 2.)

An insurgent government is regarded as possessing sufficient responsibility to prevent its naval officers from being pirates when they conform to the laws of war, even though their actions may be illegal because they are not properly qualified to exercise belligerent functions. (British Yearbook of International Law, 1938, pp. 203–204.)

Illegal actions upon the high seas are therefore not synonymous with piracy. A state or a revolutionary group can be held responsible for the unlawful acts of its vessels, and though often the epithet of piracy is hurled at some grossly unlawful act committed by a belligerent or an insurgent at sea, the terminology is moral rather than legal. Piracy in the legal sense is a special form of concurrent jurisdiction under which the warships of all states on the high seas have the authority to seize pirate vessels, piracy consisting of an act of violence for a private end outside the authority of any political group or government.

Harvard draft code and piracy.—Article 3. Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state.

1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.

2. Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.

3. Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article. (American Journal of International Law, 1932, Supplement, p. 743.)

The Nyon and Geneva arrangements.—Because of the many attacks upon merchant shipping in the Mediterranean by unidentified submarines during the course of the Spanish conflict in 1937, the French and English governments took the initiative in formulating special arrangements for dealing with this situation. At Nyon and at Geneva agreements were framed which gave to the warships of the participating powers special rights not accorded by customary international law. The Nyon arrangement in its preamble stated that these submarine attacks "should be justly treated as acts of piracy." This statement, however, did not legally confer the status of piracy upon submarines making unlawful attacks. "Illegal" not "piratical" was the proper term to apply to the actions of the undersea craft. These arrangements dealt with the method of coping with a particularly flagrant violation of the rights of innocent ships.

It should be remembered that even a visit and search conducted in the lawful manner would have been illegal since there was no belligerency. What

these arrangements did was to confer upon the warships of the participating states the right to deal drastically with any interference which involved a violation of the legal rules in regard to visit and search. Under the general law warships of third powers may intervene to protect their own vessels from any sort of molestation. By the Nyon and Geneva arrangements any warship could intervene to protect any non-Spanish ship and was enpowered even to counter-attack and, if possible, to destroy the submarine. This last grant of authority goes beyond the usual regulations which permit a reasonable use of force to protect a vessel but which do not permit the use of force beyond that required for saving the attacked vessel. These arrangements were designed to handle an illegality within an illegality, that is, they were framed with the aim of preventing an illegal method of conducting what was in any event an illegal operation. Belligerent rights were not granted by these agreements which did *not* imply that lawful methods would legalize action inconsistent with a condition of insurgency.

The Nyon Arrangement, September 14, 1937

Whereas arising out of the Spanish conflict attacks have been repeatedly committed in the Mediterranean by submarines against merchant ships not belonging to either of the conflicting Spanish parties; and

Whereas these attacks are violations of the rules of international law referred to in Part IV of the Treaty of London of April 22, 1930 with regard to the sinking of merchant ships and constitute acts contrary to the most elementary dictates of humanity, which should be justly treated as acts of piracy; and

Whereas without in any way admitting the right of either party to the conflict in Spain to exercise belligerent rights

or to interfere with merchant ships on the high seas even if the laws of warfare at sea are observed and without prejudice to the right of any participating Power to take such action as may be proper to protect its merchant shipping from any kind of interference on the high seas or to the possibility of further collective measures being agreed upon subsequently, it is necessary in the first place to agree upon certain special collective measures against piratical acts by submarines:

(*a*) Except as stated in (*b*) and (*c*) below, no submarine will be sent to sea within the Mediterranean.

(*b*) Submarines may proceed on passage after notification to the other participating Powers, provided that they proceed on the surface and are accompanied by a surface ship.

(*c*) Each participating Power reserves for purposes of exercises certain areas defined in Annex I hereto in which its submarines are exempt from the restrictions mentioned in (*a*) or (*b*).

The participating Powers further undertake not to allow the presence in their respective territorial waters of any foreign submarines except in case of urgent distress, or where the conditions prescribed in sub-paragraph (*b*) above are fulfilled.

VI: The participating Powers also agree that, in order to simplify the problem involved in carrying out the measures above described, they may severally advise their merchant shipping to follow certain main routes in the Mediterranean agreed upon between them and defined in Annex II hereto.

VII. Nothing in the present agreement restricts the right of any participating Power to send its surface vessels to any part of the Mediterranean.

VIII. Nothing in the present agreement in any way prejudices existing international engagements which have been registered with the Secretariat of the League of Nations.

IX. If any of the participating Powers notifies its intention of withdrawing from the present arrangement, the notification will take effect after the expiry of thirty days and any of the other participating Powers may withdraw on the

same date if it communicates its intention to this effect before that date.

Done at Nyon this fourteenth day of September nineteen hundred and thirty seven, in a single copy, in the English and French languages, both texts being equally authentic, and which will be deposited in the archives of the Secretariat of the League of Nations.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

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UNION OF SOVIET SOCIALIST REPUBLICS

Maxime Litvinoff

YUGOSLAVIA

Bojidar Pouritch

In view thereof the undersigned, being authorized to this effect by their respective Governments, have met in conference at Nyon between the 9th and the 14th September 1937, and have agreed upon the following provisions which shall enter immediately into force:

I. The participating Powers will instruct their naval forces to take the action indicated in paragraphs II and III below with a view to the protection of all merchant ships not belonging to either of the conflicting Spanish parties.

II. Any submarine which attacks such a ship in a manner contrary to the rules of international law referred to in the International Treaty for the Limitation and Reduction of Naval Armaments signed in London on April 22, 1930, and confirmed in the Protocol signed in London on November 6, 1936, shall be counter-attacked and, if possible, destroyed.

III. The instruction mentioned in the preceding paragraph shall extend to any submarine encountered in the vicinity of a position where a ship not belonging to either of the conflicting Spanish parties has recently been attacked in violation of the rules referred to in the preceding paragraph in circumstances which give valid grounds for the belief that the submarine was guilty of the attack.

IV. In order to facilitate the putting into force of the above arrangements in a practical manner, the participating Powers have agreed upon the following arrangements:

1. In the western Mediterranean and in the Malta Channel, with the exception of the Tyrrhenean Sea, which may form the subject of special arrangements, the British and French fleets will operate both on the high seas and in the territorial waters of the participating Powers, in accordance with the division of the area agreed upon between the two Governments.

2. In the eastern Mediterranean,

(*a*) Each of the participating Powers will operate in its own territorial waters;

(*b*) On the high seas, with the exception of the Adriatic Sea, the British and French fleets will operate up to the entrance to the Dardanelles, in those areas where there is reason to apprehend danger to shipping in accordance with the division of the area agreed upon between the two Governments. The other participating Governments possessing a sea border on the Mediterranean, undertake, within the limit of their resources, to furnish these fleets any assistance that may be asked for; in particular, they will permit them to take action in their territorial waters and to use such of their ports as they shall indicate.

3. It is further understood that the limits of the zones referred to in subparagraphs 1 and 2 above, and their allocation shall be subject at any time to revision by the participating Powers in order to take account of any change in the situation.

V. The participating Powers agree that, in order to simplify the operation of the above-mentioned measures, they will for their part restrict the use of their submarines in the Mediterranean in the following manner:

(League of Nations Document, C.409.M.273.1937.VII)

Agreement Supplementary to the Nyon Arrangement, Geneva, September 17, 1937

Whereas under the Arrangement signed at Nyon on the 14th September, 1937, whereby certain collective measures were agreed upon relating to piratical acts by submarines in the Mediterranean, the participating Powers reserved the possibility of taking further collective measures; and

Whereas it is now considered expedient that such measures should be taken against similar acts by surface vessels and aircraft;

In view thereof, the undersigned, being authorized to this effect by their respective Governments, have met in conference at Geneva on the seventeenth day of September and have agreed upon the following provisions which shall enter immediately into force:

I. The present Agreement is supplementary to the Nyon Arrangement and shall be regarded as an integral part thereof.

II. The present Agreement applies to any attack by a surface vessel or an aircraft upon any merchant vessel in the Mediterranean not belonging to either of the conflicting Spanish parties, when such attack is accompanied by a violation of the humanitarian principles embodied in the rules of international law with regard to warfare at sea, which are referred to in Part IV of the Treaty of London of April 22nd, 1930, and confirmed in the Protocol signed in London on November 6th, 1936.

III. Any surface war vessel, engaged in the protection of merchant shipping in conformity with the Nyon Arrangement, which witnesses an attack of the kind referred to in the preceding paragraph shall:

(*a*) If the attack is committed by an aircraft, open fire on the aircraft;

(*b*) If the attack is committed by a surface vessel, intervene to resist it within the limits of its powers, summoning assistance if such is available and necessary.

In territorial waters each of the participating Powers concerned will give instructions as to the action to be taken by its own war vessels in the spirit of the present Agreement.

Done at Geneva this seventeenth day of September 1937, in the English and French languages, both texts being equally authentic, in a single copy which will be deposited in the archives of the Secretariat of the League of Nations. (League of Nations Document C.409.M.273.1937.VII.)

The submarine rules.—Submarine warfare and piracy were definitely linked together in the resolutions presented by Mr. Root at the Conference on Limitation of Armaments in Washington in 1922. As presented, Mr. Root's proposal sought to prohibit all use of submarines against merchant vessels and to attach the penalty of piracy to any such employment. As finally embodied in the unratified Treaty Relating to the Use of Submarines and Noxious Gases in Warfare, the destruction of merchantmen without prior visit, search, and placement of the personnel in safety was declared to be a violation of the laws of war subjecting any person in the service of any Power who should violate such a rule, whether or not such person is under orders of a governmental superior, to trial and punishment as if for an act of piracy. This conclusion was reached in spite of the consensus that it was not competent for the five Powers present at the Conference to establish new rules of international law, including the branding of such action as piracy *jure gentium.* The decision was also taken in spite of the fact that only one delegate, Mr. Hanihara of Japan, raised a question as to the exact meaning of "punishment as if for an act of piracy," which was brusquely pushed aside by Mr. Hughes and Mr. Root who made no adequate answer and immediately cut off further debate. While the treaty was not ratified, it may be pertinent to point to the carefully studied observation in the comment on the Draft Convention on Piracy of the Harvard Law School Research in International Law that "properly speaking * * * piracy is not a legal crime or offense under the law of nations."

Part IV of the London Naval Treaty of 1930 invited states to accede to the proposition that according to international law submarines must conform to the rules of surface craft, and that, except in case of resistance to visit and search, merchant vessels must not be destroyed without first

placing the crew, passengers, and ship's papers in safety. Non-conformity by submarines was not branded an act of piracy, nor was any state authorized to bring to trial or to inflict the punishment for piracy upon the officers or crew of any submarine violating the rules. While nine of the states invited to the Nyon Conference had agreed to abide by the rules of this treaty, the Spanish Government had not done so. (N. J. Padelford, "Foreign Shipping during the Spanish Civil War," American Journal of International law, 1938, pp. 274–275.)

LONDON, NOVEMBER 6, 1936

Whereas the Treaty for the Limitation and Reduction of Naval Armaments signed in London on the 22nd April, 1930, has not been ratified by all the signatories;

And whereas the said treaty will cease to be in force after the 31st December, 1936, with the exception of Part IV thereof, which sets forth rules as to the action of submarines with regard to merchant ships as being established rules of international law, and remains in force without limit of time;

And whereas the last paragraph of Article 22 in the said Part IV states that the high contracting parties invite all other Powers to express their assent to the said rules;

And whereas the Governments of the French Republic and the Kingdom of Italy have confirmed their acceptance of the said rules resulting from the signature of the said treaty;

And whereas all the signatories of the said treaty desire that as great a number of Powers as possible should accept the rules contained in the said Part IV as established rules of international law;

The undersigned, representatives of their respective governments, bearing in mind the said Article 22 of the treaty, hereby request the Government of the United Kingdom of Great Britain and Northern Ireland forthwith to communicate the said rules, as annexed hereto, to the governments of all the Powers which are not signatories of the said treaty, with an invitation to accede thereto definitely and without limit of time.

RULES

(1) In their action with regard to merchant ships, submarines must conform to the rules of international law to which surface vessels are subject.

(2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.

Signed in London, the 6th day of November, nineteen hundred and thirty-six. (British Treaty Series, No. 29, 1936.)

Nonintervention and the Spanish civil strife.— Soon after the outbreak of the fighting in Spain in July 1936, the European powers instituted the scheme of Non-Intervention. This was undertaken primarily for political reasons, the outside states being desperately anxious to avoid involvement in the struggle. The ideological division between the Fascist powers supporting General Franco and those inclining to favor the established republican government made the crisis acute. It was feared that the rival groups outside might come into direct collision as a result of their efforts to supply their Spanish favorites with the sinews of war. The Non-Intervention scheme took the form not of a comprehensive, binding international treaty, but rather of a series of exchanges of notes and of unilateral domestic acts which frequently varied with one another but were generally pat-

terned along the same lines. The nations participating in the arrangement undertook to forbid the sale of arms and implements of war to either side. The Spanish rebels were thus placed upon the same level as the so-called Loyalists, even though there was no belligerency. The whole scheme was unique, and there has been nothing like it in the history of international law. In undertaking these special obligations, the British and French Governments waived the right to assist the government they recognized in Spain. They did so hoping thereby to prevent Italy and Germany from giving governmental aid to the rebels, a right which those two powers did not possess, at least not until they recognized General Franco as the legitimate ruler of Spain in November 1936 after the Non-Intervention plan had supposedly come into operation.

To implement the Non-Intervention accord, a special Scheme of Observation was adopted in May 1937. By its terms warships of Great Britain, France, Italy, and Germany, were to patrol Spanish marginal seas in a zone extending from the 3-mile limit outward for 7 miles. In addition, elaborate plans were made for observers to travel on the ships of third states going to Spain, the idea of all this being to check up on the supplies reaching Spain and to report any infractions of the Non-Intervention accord to a central committee in London. This patrol by war vessels was not a blockade in any sense of the word. The powers engaged were not at war with Spain and were not taking reprisals. The patrol ships had no right of visit and search, and no right to interfere with the vessels of states not parties to the Non-Intervention

agreement. A right of approach belonged to the patrol ships but they could not employ force to ascertain the true character of a vessel under suspicion which flew the flag of a non-signatory power. This situation presented delicate questions for international law. It was unique and went into effect as a special scheme for a special state of affairs. The terms of the observation plan will be found in the appendix to this volume.

(The non-intervention scheme) owes its inception to M. Blum of France and is founded upon an exchange of notes between Britain and France, August 15th, 1936, these notes, which were substantially identical, contained reference to the establishment of a common attitude toward the Spanish strife, a preamble, and three declarations of policy. The preamble recited that the governments, deploring the events in Spain, had decided to abstain rigorously from all interference (*de toute ingérence*), direct or indirect, in the internal affairs of Spain, on the basis of the desire to avoid complications prejudicial to the good relations between their "Peoples." They then "declared": (1) they would prohibit the direct or indirect exportation or reëxportation of all "arms, munitions and materials of war as well as all airplanes, mounted or dismantled, and all ships of war" from their territory to Spanish territories; (2) the prohibitions would apply to contracts in the process of execution; (3) the governments would keep other governments participating in the mutual understanding (*cette entente*) informed of the measures taken to carry out the prohibitions. The application of the declaration was made contingent upon the adherence of the other government, plus the governments of Germany, Italy, the Soviet Union, and Portugal.

Twenty-seven governments eventually made similar declarations, in one form or another. However, the composition and contents of the notes varied so much it can hardly be said that all of the states declared their intention of doing identically the same things. Above all, it must be emphasized that there was no one instrument which all signed or adhered

to, in spite of constant employment of the term "agreement." The agreement was merely a concert of policy, and its fulfillment depended entirely upon the initiative of each state.

Analysis of the notes reveals that 15 (aside from those of Britain and France) of the 27 repeated verbatim both the preambulatory reasons for making the declaration and the three basic declarations of policy. Between these states and France and Great Britain then, there was a community of policy on the steps to be taken and on the reasons for taking them.

The notes of six states repeated verbatim the three seriatim declarations but omitted the preamble. By omitting the preamble these states left themselves free to engage in all forms of interference or intervention not specifically set forth in the first two declarations, while the seventeen others noted above agreed to refrain from *all* interference, direct or indirect. Legally speaking, these six states restricted themselves less than did the others, and they are hardly to be condemned for allowing volunteers, officers, financial, and moral aid passing to Spain, public opinion and newspapers notwithstanding. (N. J. Padelford, "The International Non-Intervention Agreement and the Spanish Civil War," American Journal of International Law, Oct. 1937, pp. 579–580.)

The United States and Spanish civil strife.—The American Government, acting independently, enacted legislation in harmony with the provisions of the European non-intervention scheme. On January 8, 1937 a special law of Congress made unlawful the export of arms, ammunition, or implements of war to Spain during the existence of the state of civil strife. The so-called neutrality law of May 1, 1937, included a provision dealing with civil strife and under that statutory authorization the President proclaimed again an embargo on armed shipments to Spain. The United States thus dealt impartially with both sides, despite the fact that we were not really neutral, a status impossible without the existence of war.

Special act of Congress in regard to Spain.—

JOINT RESOLUTION TO PROHIBIT THE EXPORTATION OF ARMS, AMMUNITION, AND IMPLEMENTS OF WAR FROM THE UNITED STATES TO SPAIN, JANUARY 8, 1937

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That during the existence of the state of civil strife now obtaining in Spain it shall, from and after the approval of this Resolution, be unlawful to export arms, ammunition, or implements of war from any place in the United States, or possessions of the United States, to Spain or to any other foreign country for transshipment to Spain or for use of either of the opposing forces in Spain. Arms, ammunition, or implements of war, the exportation of which is prohibited by this Resolution, are those enumerated in the President's Proclamation No. 2163 of April 10, 1936.

Licenses heretofore issued under existing law for the exportation of arms, ammunition, or implements of war to Spain shall, as to all future exportations thereunder, ipso facto be deemed to be cancelled.

Whoever in violation of any of the provisions of this Resolution shall export, or attempt to export, or cause to be exported either directly or indirectly, arms, ammunition, or implements of war from the United States or any of its possessions, shall be fined not more than ten thousand dollars or imprisoned not more than five years, or both.

When in the judgment of the President the conditions described in this Resolution have ceased to exist, he shall proclaim such fact, and the provisions hereof shall thereupon cease to apply.

Approved, January 8, 1937, at 12.30 p. m. (Public Resolution, No. 1, 75th Cong.)

Sections of the Act of May 1, 1937.—

SEC. 1. "(c) Whenever the President shall find that a state of civil strife exists in a foreign state and that such civil strife is of a magnitude or is being conducted under such conditions that the export of arms, ammunition, or implements of war from the United States to such foreign state would threaten or endanger the peace of the United

States, the President shall proclaim such fact, and it shall thereafter be unlawful to export, or attempt to export, or cause to be exported, arms, ammunition, or implements of war from any place in the United States to such foreign state, or to any neutral state for transshipment to, or for the use of, such foreign state."

"SEC. 10. Whenever the President shall have issued a proclamation under the authority of section 1, it shall thereafter be unlawful, until such proclamation is revoked, for any American vessel engaged in commerce with any belligerent state, or any state wherein civil strife exists, named in such proclamation, to be armed or to carry any armament, arms, ammunition, or implements of war, except small arms and ammunition therefor which the President may deem necessary and shall publicly designate for the preservation of discipline aboard such vessels." (Public Res. No. 27, 75th Cong., ch. 146, 1st sess.)

Proclamation in regard to arms.—

AMERICAN VESSELS ENGAGED IN COMMERCE WITH SPAIN

Section 10 of the joint resolution of Congress approved May 1, 1937, amending the joint resolution approved August 31, 1935, provides as follows:

"SEC. 10. Whenever the President shall have issued a proclamation under the authority of section 1, it shall thereafter be unlawful, until such proclamation is revoked, for any American vessel engaged in commerce with any belligerent state, or any state wherein civil strife exists, named in such proclamation, to be armed or to carry any armament, arms, ammunition, or implements of war, except small arms and ammunition therefor which the President may deem necessary and shall publicly designate for the preservation of discipline aboard such vessels."

Section 11 of the said joint resolution provides as follows:

"SEC. 11. The President may, from time to time, promulgate such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out any of the provisions of this Act; and he may exercise any power or authority conferred on him by this Act through such officer or officers, or agency or agencies, as he shall direct."

The President's proclamation of May 1, 1937, issued pursuant to the provisions of section 1 of the above-mentioned joint resolution provides in part as follows:

"And I do hereby delegate to the Secretary of State the power to exercise any power or authority conferred on me by the said joint resolution, as made effective by this my proclamation issued thereunder, and the power to promulgate such rules and regulations not inconsistent with law as may be necessary and proper to carry out any of its provisions."

In pursuance of those provisions of the law and of the President's proclamation of May 1, 1937, which are quoted above, the Secretary of State announces that American vessels engaged in commerce with Spain may carry such small arms and ammunition as the masters of these vessels may deem indispensable for the preservation of discipline aboard the vessels. (Press Releases, Vol. 16, No. 396.)

Attacks on foreign ships during Spanish civil strife.—During the Spanish conflict the ships of third states were frequently molested both inside and outside of territorial waters by surface vessels, aircraft and submarines of the insurgent and government forces. These attacks were entirely unlawful and in many cases foreign powers have intervened both to protest sharply and to protect their shipping. Following are some instances of such unlawful attacks:

The Nantucket Chief.—Mr. T. Monroe Fisher, American vice consul at Palma de Mallorca, reported to the Department through the consulate at Marseille that he was informed by local naval authorities of the seizure of the *Nantucket Chief* on January 18, 1938, by Nationalist naval vessels. The ship is now under the control of a Nationalist naval officer. The manifest indicates that the vessel has a cargo of gasoline and kerosene shipped from a Russian port and destined for Barcelona.

The crew numbers about 30, of whom about 27 are American citizens, 1 a Finnish citizen, and 2 British subjects.

The American oil tanker *Nantucket Chief* was seized by the naval forces of General Franco on the night of January

17, 1938, in latitude 40°45′ N., longitude 3°45′ E., approximately 48 miles north of the Balearic Islands and 80 miles southeast of the nearest point on the Spanish coast. At the time of seizure the tanker was carrying a cargo of petroleum from the Russian Black Sea port of Tuapse to Barcelona, under charter to the Spanish petroleum monopoly. The vessel was taken to Palma de Mallorca and the Captain, Mr. J. E. Lewis, was taken ashore and imprisoned on January 26 on charges not known to the Department.

The *Nantucket Chief* is a vessel of American registry, and the captain and most of the crew are of American nationality.

The *Nantucket Chief* is owned by the Nantucket Chief Steamship Co., a corporation organized under the laws of the State of Delaware.

Representations were made informally to General Franco through the American Ambassador to Spain, temporarily stationed at St. Jean de Luz, France, with a view to the immediate release of this American vessel, of the captain, and of the crew.

The Department is now informed that the *Nantucket Chief* has left Palma de Mallorca for a mainland port or ports, and that after the discharge of its cargo the vessel and crew will be set at liberty. The Department is further informed that Capt. J. E. Lewis, who is still in prison at Palma, will be released within a few days.

Consul T. Monroe Fisher at Palma has reported (Feb. 10, 1938) to the Department of State that Capt. J. E. Lewis was released and left Wednesday morning by plane for Cádiz en route to Málaga to join the *Nantucket Chief*. He had been well treated while imprisoned. He had been slightly ill with influenza and was given proper medical attention.

Consul Leo J. Callanan at Málaga reported this afternoon that Captain Lewis arrived at Málaga this morning and has resumed charge of the *Nantucket Chief*. The Department of State has not yet received word regarding the release of the ship although yesterday it did have a message giving the information that orders had been issued for the release of the ship. (Press Releases, Vol. XVIII, Nos. 436, 437.)

The U. S. S. Kane.—The Secretary of State sent the following telegraphic instruction last night to the American Embassy at Madrid:

"AUGUST 30, 1936.

"AMERICAN EMBASSY,
"*Madrid, Spain.*

"The United States Destroyer *Kane* left Gibralter at 8:12 a. m. August 30, en route to Bilbao to assist in the work of evacuating American nationals. According to report from her Commanding Officer, at 4:10 p. m., August 30, while the vessel was at 36 degrees, 33 minutes north and 7 degrees, 35 minutes west (approximately 38 miles from the Spanish coast) an unidentified tri-motored, low winged monoplane flew over the *Kane* and dropped two bombs which exploded near the vessel. The *Kane* was flying the American flag at her foremast head and in addition had an American ensign horizontal on top of the well deck awning. When this attack was made, the *Kane* increased her speed to maneuver away from the plane. At 4:25 p. m. the plane again flew over the *Kane* and dropped a third bomb. At 4:26 p. m. the *Kane's* anti-aircraft gun fired two rounds in the direction of the plane. At 4:32 p. m. the plane again flew over the *Kane* and dropped three more bombs, making a total of six. The *Kane's* antiaircraft gun fired nine rounds in the direction of the plane during its approach and retreat.

The attitude of the American Government in respect to the conflict in Spain is well known. The American Government has stressed the complete impartiality of its attitude and has publicly stated that, in conformity with its well established policy of non-interference with internal affairs in other countries, either in time of peace or in the event of civil strife, it will, of course, scrupulously refrain from any interference whatsoever in the unfortunate Spanish situation.

"Since the Government forces in Spain have, in the friendliest spirit, made every possible effort to avoid injury to American nationals and American property, it can only be assumed that the attack on the United States Destroyer *Kane*, if made by a Government plane, was due to her

identity having been mistaken for a vessel of the opposing forces. Because of the friendly attitude of the Spanish Government toward the United States and the absence of any motive whatsoever for an attack upon an American vessel, it is not conceivable that a Government plane would knowingly make such an attack. The American Government feels confident that it is fully understood in every quarter that the sole purpose of the presence of American naval vessels about the shores of Spain is to afford facilities for the removal of American nationals from Spain.

"Since the plane making the attack was unidentified, the President has directed that this incident be brought to the attention of the Spanish Government through you and informally, with no intention as to recognition, to the attention of General Franco through the American Consul at Seville, with the request that both sides issue instructions in the strongest terms, as the American Government feels confident they will desire to do, to prevent another incident of this character.

"Take up this matter immediately with the Spanish Government in the sense of the foregoing, endeavor to obtain a categorical statement as to whether the plane making this attack was a Government plane, and urge and insist upon definite assurance that appropriate instructions will immediately be issued to the Government armed forces. Telegraph immediately and fully results of your representations." (Press Releases, Vol. XV, No. 363.)

Attack in British waters.—The British Government protested to General Francisco Franco today against the violation of British territorial waters by Insurgent vessels in their action against the Loyalist destroyer José Luis Diez on Dec. 30. Britain reserves the right to claim compensation for injuries to four British subjects injured by shell splinters and damaged property.

The holding of the destroyer by British authorities at Gibraltar is described here as unusual, although not irregular. The ship is not interned but her crew, having failed to remove her from British territorial waters within the period for which she received permission to stay, has been

repatriated. The ship remains immobilized although presumably she would be immediately handed over if the Spanish Government asked for her and arranged to remove her without violation of territorial waters. Such a possibility, however, seems remote at present. (New York Times, January 12, 1939.)

The Wisconsin.—The American freighter *Wisconsin*, under command of Captain Hiram Taft, left Barcelona today for an undisclosed port, so it is now permissible to tell you how an armed Rebel trawler fired four shots at her off Gibraltar and tried to capture her.

Captain Taft, who is a Yankee, has been carrying on a dangerous Spanish trade all the year through bombings, mutinies and other dangers. He refused to halt when attacked and pushed straight ahead, for his ship's American flag was flying and he carried a legal cargo of lentils, rice and other food.

It was a case of fortune favoring the brave, for the Rebel trawler developed engine trouble just at the crucial moment and had to abandon the chase. She signaled ahead to a Rebel cruiser, which, however, did not molest the *Wisconsin.*

Captain Taft made a full report to the United States Consul at Barcelona, who in turn forwarded the information to the State Department.

As Captain Taft told the writer the story in the relative safety of a Barcelona hotel this is what happened:

FRENCH VESSEL ATTACKED

Eighty miles west of Gibraltar the *Wisconsin* heard an S O S from a French ship en route to Brest, France, from Oran, Algeria, and in later messages learned that the French ship had been fired on, stopped and boarded by Spanish Rebels, who had started to take her to Ceuta, Spanish Morocco, when a French cruiser came to her aid.

The Rebels then gave up their prey, but Captain Taft was heading for the same spot and foresaw trouble. He radioed to Gibraltar, asking if an American destroyer or cruiser were there, but received a negative reply. This was in the evening on Nov. 16.

At 1 A. M. the next day the radio officer informed Captain Taft that another French vessel had been captured and apparently had not been rescued.

About 5 o'clock the same morning, the captain continued, "when about five and one-half miles south southeast of Gibraltar, an armed trawler proceeded alongside, sweeping the *Wisconsin* with a searchlight. At that time the American flag was flying from the flagstaff and huge American flags were painted on the vessel's sides. The trawler kept the searchlight on the flagstaff about two minutes and the flag was open to windward.

HALTS IN MIDST OF ATTACK

"The trawler proceeded ahead of the *Wisconsin*, fired a shot across the bow and ordered me to halt, which I refused to do. Then another shot was fired and this time it was not a blank for shrapnel whistled over me and the chief officer. Two more shots were fired, after which the trawler stopped, evidently because of engine trouble, but it kept flashing its searchlight in the air and then at the *Wisconsin*.

"About ten minutes later we were swept by two searchlights from a Spanish Rebel cruiser which was lying to the east of the Strait. She kept one searchlight on the American flag about a minute but did not hail and I proceeded out of the Strait of Gibraltar."

This was a typical incident of the Spanish trade. It is a hard, dangerous game but it has its rewards in money and excitement and, in Captain Taft's case, moral satisfaction for the wheat, beans, rice and medical supplies he has brought to Loyalist Spain on repeated trips are desperately needed. (New York Times, December 4, 1938.)

The Palos.—That the Fascist Bloc did not confer belligerent status upon the Spaniards by their (recognition) of the 19th of November, 1936 was clearly manifested by the German treatment of the Loyalist seizure of the steamer *Palos*, December 24, supposedly en route from Hamburg to Vigo, the German ship was picked up by Basques in * * * the Bay of Biscay and taken in with 1,500 tons of "prohibited freight" and two Spanish insurgent agents on board.

The German Government, in demanding the release of the ship, alleged "the *Palos* was seized far outside the territorial waters of the Spanish coast, namely 23 miles northeast of Cape Machichaco. The captain of the *Palos* refused to sign a protocol according to which the *Palos* supposedly was seized five miles off the coast, although this alleged location of seizure also lies outside the three mile limit and therefore outside the sovereign territory of Spain." The Basques denied that the arrest took place outside of their jurisdiction, but refused to specify exactly where it did occur.

If the incident occurred where the Germans charged it did, it must be said that the vessel was in a strange location for a course Hamburg-Vigo. If the ship was seized five miles from the coast, the Spaniards might maintain that under their historic interpretation of the principle of jurisdiction in marginal waters—that is to say, out to six miles from the coast—they were acting correctly in seizing the German boat.

If freedom of passage through marginal waters were demanded by Germany, it must be admitted that, while many believe there is a right of free passage in time of peace, the law is not entirely certain in this regard, and especially in time of *quasi*-peace such as prevails in Spain at the moment.

Whatever may have been the locus of the seizure of the *Palos*, and regardless of whatever merits there may have been in the seizure by the Spaniards in the first instance, Germany demanded the release of the vessel, her cargo, and the Spanish subjects on board. Failing to secure the release of the contraband and the Spanish rebel passengers, the German cruiser *Koenigsburg* seized the 1,500-ton Spanish steamer *Argonne* on January 1, attempted to seize the steamer *Soton* January 2, and seized the steamer *Marta Junquera* January 4. The government communiqué justified the action in these words:

"After the Red Rulers in Bilbao refused to surrender to the German cruiser *Koenigsburg* the passengers and part of the cargo retained from the steamer *Palos*, the German Government, as previously announced, saw itself compelled to enforce its demands through counter measures. In pursuit of this necessity to defend German sovereign rights

against an act of piracy a Red Spanish steamer has been seized provisionally by the German naval forces in Spanish waters."

The loyalists were warned that if their demands were not met by January 8, "the Spanish steamers and their cargoes will be utilized by the German Government in their account with the Spanish Government recognized by it. In case of repetition of acts of piracy against German merchant vessels, the German Government will be compelled to take further measures." The vessels were turned over to the rebels on the failure of the Basques to hand over the goods and passengers.

The tenor of the German ultimata and the reprisals taken indicate clearly that the Reich did not recognize that the Spaniards possessed belligerent rights. Not enjoying such rights respecting German vessels on the high seas, the Germans were quite within bonds in their demands and, failing to secure them, in taking such reprisals as seemed a *quid pro quo* for the tort committed. (N. J. Padelford, "International Law and the Spanish Civil War," American Journal of International Law, April, 1937, pp. 237–239.)

British policy in regard to attacks.—The British Government has made it abundantly clear that it does not regard the existence of civil war in Spain as conferring license upon any Spanish forces to interfere with British shipping on the high seas, and that it will not tolerate even such interference as the visiting of British ships in order to establish their character. Still less, of course, does it tolerate any more violent interference, and the British Navy has orders to afford protection to all British shipping against attack upon unarmed merchantmen provided they are its own. It has persistently advanced the principle that international law no less than the dictates of humanity and civilization forbids such attacks even in time of war * * *.

It is no justification of these crimes to plead that neither Spanish Government has acceded to the *Procès-Verbal* adopted by the rest of the world; or that since they are not accorded the belligerent right of visit and search of merchant ships at sea, knowing that their enemies' ships are using false

colors, they have no alternative but to attack at sight. A new government seeking recognition does not recommend itself to the world by flouting the principles adopted by the world, even on the plea that its rival has not formally adopted them; and even the accordance of belligerent rights would not carry license to subject the ships even of the rival Government in its own country to the treatment inflicted of late upon all and sundry * * *. (London Times, August 18, 1937.)

The observation scheme and visit and search.— In part (*a*) of Situation III the cruiser *Fona* of state F is functioning in a double capacity: it is a patrol ship under the Observation scheme and it is a national warship which has the duty to protect the commerce of state F. Though the *Feran* is violating both the Non-Intervention scheme and the domestic law of state F, since it is carrying aircraft to state B, the *Cape,* the cruiser of the Commoners, possesses no rights of visit and search. Enforcement of the domestic legislation and of the special scheme by which the *Feran* is bound, is not the function of an insurgent warship whose actions must be controlled entirely by international law. As pointed out above, insurgent craft have none of the rights of belligerents at sea and any interference with the *Feran* is illegal. It is for the *Fona* to warn the master of the *Feran* that the latter is infringing upon the special rules, and it is the duty of the *Fona* to protect the *Feran* from any internationally illegal molestation. A cruiser of the government B since it is a warship of a recognized power, would have the right to approach the *Feran* (The Marianna Flora, 11 Wheaton, 1) but it would have no authority to visit and search, so that its rights would not differ greatly from those of the *Cape.*

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In part (*c*) the *Gyra* is violating no law, either domestic or international, and is engaged upon a perfectly lawful voyage. Oil is not a commodity which comes under the heading of "Arms, Ammunition and Implements of War" and thus was not prohibited by the Non-Intervention plan or by the domestic law of state G. The carrying of arms by the *Gyra* for the preservation of discipline was lawful. (See Sec. 10 of the American law above.) Like the *Cape* in part (*a*) the *Bain* had no right to summon the *Gyra* to come to for visit and search. It is incumbent on the *Geno,* the cruiser of state G, to come to the *Gyra's* assistance and to drive off the *Bain* by force if necessary. The *Geno* would have no right, if it arrives too late to save the *Gyra,* to make a counter-attack upon the *Bain,* either under general international law or the special Geneva Arrangement. Warships summoned to aid merchant vessels are limited to the use of force for "preventive" purposes, not for punitive. Force "can never be exercised with a view to inflicting punishment. Retaliation for acts already committed is not allowable." (United States Navy Regulations, Art. 723.) Where submarines were concerned, the Nyon accord permitted counter-attacks for purposes immediately punitive but ultimately preventive. Under the Geneva accord the cruiser of state H, if it actually witnessed the attack by the *Bain,* could intervene to protect the merchant vessel to the best of its ability.

Resistance to illegal visit and search.—Even if there had been belligerency the *Bain* would have had no right to sink the *Gyra* merely because the latter resisted visit and search. If a summoned

vessel resists or takes to flight it may be pursued and brought to by forcible means if necessary.

The United States regarded resistance or flight as ground for using force sufficient to cause the merchant vessel to lie to * * * but not a ground for sinking the vessel. Of course the * * * vessel might be sunk in the exercise of the right, but the use of force was held to be restricted to that necessary to bring the vessel to, and forcible resistance by the merchant vessel was not in itself a ground for sinking (it) but a just ground for its condemnation. (Naval War College Situations, 1934, p. 50.)

Section 4295 U. S. Revised Statutes: The commander and crew * * * may oppose and defend against any aggression * * * by any armed vessel * * * not being a public armed vessel of some nation in amity with the United States.

As the action of the *Bain* was entirely illegal, the *Gyra* had the right to resist, though such action in the face of overwhelming force may have been somewhat quixotic. Orders issued by the United States authorities enjoin resistance to illegal visit and search, even by a recognized government. (Naval War College Situation 1912, p. 27.) It is true that the arms on board the *Gyra* were there "for the preservation of discipline" and resistance to legal visit and search would have been unjustifiable, for the *Gyra* would then be an armed merchantman. In the light, however, of the practice and orders concerning *illegal* interference, it seems reasonable to declare the *Gyra's* resistance a legal, though perhaps a foolish, act.

Illegal attacks by submarine.—In part (*b*) the *Iris* with its cargo of barbed wire was breaking no domestic or international law. Any possible infraction of the Non-Intervention scheme need not be considered because state I was not a party to

that arrangement. The submarine acted illegally whether it encountered the *Iris* inside or outside the 3–mile limit. Within territorial waters a submarine, disclosing its identity, would have the right to stop the *Iris* and to direct it but in no circumstances to destroy it. Outside the 3–mile limit a properly marked submarine of state B might approach the *Iris* but it could not visit and search it or order its destruction. Visit and search by the established government or by the rebels during insurgency is illegal. (Naval War College Situation, 1912, pp. 21–24; 2 Moore, "International Arbitrations," pp. 1021.)

Even if the situation had been one of belligerency, the *Iris* could not legally have been ordered about in this fashion. The submarine should have shown its flag and should have visited and searched the *Iris* before ordering destruction. According to the London rules of 1930 there could be no destruction of the merchant ship, even if the lives of those on board were saved, unless the ship had been captured, and *then* it could have been destroyed *only* if taking it into a port would have involved danger to the submarine and if the ship's papers had been placed in safety. (See also Arts. 49 and 50 of the Declaration of London, 1909.)

Thus on every count the submarine was guilty of unlawful action. The Nyon arrangement was designed to meet just such a situation as this, and though the ship's personnel was given a chance for safety, the submarine was attacking "in a manner contrary to the rules of international law referred to" in the London Treaty of 1930 and the Protocol of 1936. Whereas normally the *Iona*

would have the right to employ only preventive force to protect the *Iris,* as a warship of a state signatory to the Nyon treaty it may use force beyond that which is actually needed to save the *Iris* and may counter-attack the submarine. This was the special grant of authority in the Nyon convention which was drafted with a view to halting attacks made in an illegal manner, attacks performed by legal methods being left subject to the general rules which permit preventive force by the protecting warship of a merchant vessel's own state. The cruiser of State H likewise should intervene to attack the submarine. A submarine of the Commoners or of state D acting in similar illegal fashion would be subject to the same drastic treatment.

What constitutes an "attack."—No actual firing of a projectile or sinking of a ship has to take place for an act or a series of acts to constitute an "attack." In this instance it is not necessary to wait until the torpedo is launched before the submarine can be considered to have attacked the *Iris.* The word "attack" covers more than the mere employment of force. To reason otherwise would be to go counter to all the dictates of law and common sense. A threat can be an attack just as well as the carrying out of that threat, and the notice to the *Iris* in this case may be likened to an "assault" in domestic law.

It is not essential in order to constitute a wrong that the wrongdoer shall have fully carried out his intention nor that any actual damage shall result * * * (he is) liable if his conduct was such as reasonably created in the plaintive the belief that such ability and intent existed. (A. B. Hall, "Elementary Law Manual," p. 52.)

Résumé.—In times of civil strife when there is no recognition of belligerency, the merchant ships of third states are not subject to visit and search on the high seas and it is the duty of war vessels of those states to protect their nations' merchant shipping from interference. Within territorial waters a parent state, in cases of insurgency, may close a port provided it does so "effectively," and the rebels too within the 3-mile limit may prevent supplies from reaching their domestic adversaries. These are the rules for the usual instances of insurgency. In particular cases, like that of Spain recently, and that of state B in Situation III, foreign powers may adopt special measures like those of Non-Intervention, the American legislation on civil strife, and the Nyon and Geneva arrangements. Such actions, however, are based not upon international law, but upon consideration of politics and expediency at the moment. In this situation, therefore, the cruisers *Fona, Iona,* and *Geno* are obligated to employ force against the cruisers and submarines which are making unwarranted attacks upon innocent (at least insofar as international law is concerned) merchant ships. Special rights attach to the cruisers of I and H under the Geneva and Nyon Conventions, and the cruisers of F and G, in addition to protecting ships of their fellow nationals, have special duties under the Non-Intervention scheme of Observation. The rules of the usual law and the stipulations of these new and unique conventions combine to form the basis for the solution.

SOLUTION

(*a*) The *Fona* should notify the *Feran* that it is coming to its aid to protect it against an illegal act. The *Fona* also should notify the *Cape* that the latter has no right to interfere with the *Feran* and should threaten the use of force against the *Cape* if it refuses to desist. The rights would be the same if the summons had been by a cruiser of state B.

(*b*) The *Iona* should notify the *Iris* to try to escape and should notify the submarine that it has no rights in this situation and that force will be used against it for the protection of the *Iris*. If the *Iona* arrives before the *Iris* is actually attacked it should drive off the submarine by force, and if it reaches the place of attack too late to save the *Iris*, it should counter-attack the submarine. The rights would be the same if the submarine had been under the flag of the Commoners or that of state D.

(*c*) The *Geno* should notify the *Gyra* to cease its resistance and should notify the *Bain* that the latter has no right either to visit and search or to sink the *Gyra* and should threaten force to compel it to desist. The rights would be the same if the summons was by a cruiser of the Commoners.

The cruiser of state H should take no action in the case of the *Feran*. In the case of the *Iris*, it may intervene and may counter-attack and destroy the submarine. In the case of the *Gyra*, if it witnessed the attack, it may intervene to protect the *Gyra* but has no authority to counter-attack or destroy the *Bain*.

APPENDIXES

I

THE CASE OF THE U. S. S. "PANAY," DECEMBER 12, 1937

[Press Releases, Vol. 17, Nos. 429 and 430]

The Secretary of State last night (Dec. 12, 1937) sent a preliminary instruction to the American Ambassador to Japan, Mr. Joseph C. Grew. The preliminary instruction read as follows:

"Telegrams from Hankow indicate that yesterday and today American and British naval and merchant vessels at various points on Yangtze above Nanking were repeatedly fired on and bombed. A Japanese source is reported to have stated at Wuhu that Japanese military forces have orders to fire on all ships on the Yangtze. Today the U. S. S. *Panay* and three Standard Oil steamers at point twenty-seven miles above Nanking are reported bombed and sunk and survivors—including Embassy personnel, Navy personnel and some refugees—are now at Hohsien. Please immediately inform Foreign Minister Hirota, ask for information, and request that Japanese Government immediately take appropriate action. Impress upon him the gravity of the situation and the imperative need to take every precaution against further attacks on American vessels or personnel.

"When we have further particulars I shall give you further instruction."

Ambassador Joseph C. Grew today reported to the Secretary of State from Tokyo, as follows:

"The Minister for Foreign Affairs has just called on me in person at the Chancery and has informed me of the receipt of a Domei report from Shanghai that in following fleeing remnants of the Chinese army Japanese planes had bombed three Standard Oil vessels and had sunk the U. S. S. *Panay*

while in the close vicinity on the Yangtze above Nanking. The Minister said that he had as yet received no official report but that he had come immediately to express to our Government the profound apology of the Japanese Government and that Ambassador Saito would do the same to you. He said that Admiral Hasegawa had accepted full responsibility for the accident. He said that immediately after my visit this morning he had communicated my representations to the Japanese naval and military authorities. Hirota said 'I cannot possibly express how badly we feel about this.' The Navy and War Ministers have sent similar expressions of regret to the Navy and War Departments in Washington through the Naval and Military Attachés here."

When the Secretary of State saw the President today just prior to his meeting with the Japanese Ambassador, at the Department of State, the President gave Secretary Hull the following memorandum:

"The White House, *Washington.*

"Memorandum Handed to the Secretary of State at 12:30 p. m., December 13, 1937

"Please tell the Japanese Ambassador when you see him at one o'clock:

"1. That the President is deeply shocked and concerned by the news of indiscriminate bombing of American and other non-Chinese vessels on the Yangtze, and that he requests that the Emperor be so advised.

"2. That all the facts are being assembled and will shortly be presented to the Japanese Government.

"3. That in the meantime it is hoped the Japanese Government will be considering definitely for presentation to this Government:

"*a.* Full expressions of regret and proffer of full compensation:

"*b.* Methods guaranteeing against a repetition of any similar attack in the future.

"F. D. R."

Secretary Hull informed Ambassador Saito of this instruction from the White House at 1 o'clock, December 13, 1937.

The Japanese Ambassador called upon the Secretary of State at 1 o'clock this afternoon. He informed the Secretary that the Foreign Minister of Japan, before receiving official reports concerning the bombing and sinking of the U. S. S. *Panay*, called upon Ambassador Grew in Tokyo and offered regrets.

The Japanese Foreign Minister had instructed Ambassador Saito that reports were to be given to the Secretary of State. The Ambassador was also instructed to extend full regrets and apologies which he came to the Secretary to do.

The Ambassador added that the American authorities had informed the Japanese authorities of the position of the American vessels and that therefore the bombing was a very grave blunder.

The Ambassador said further that the Japanese authorities were trying to furnish relief to the survivors at Hohsien, but that the place is one where Chinese and Japanese troops are fighting and that it was a difficult matter to get relief to them.

The Secretary of State last night instructed the American Ambassador to Japan, Mr. Joseph C. Grew, to communicate to the Minister for Foreign Affairs of Japan the following note:

"The Government and people of the United States have been deeply shocked by the facts of the bombardment and sinking of the U. S. S. *Panay* and the sinking or burning of the American steamers *Meiping*, *Meian* and *Meisian* by Japanese aircraft.

"The essential facts are that these American vessels were in the Yangtze River by uncontested and incontestable right; that they were flying the American flag; that they were engaged in their legitimate and appropriate business; that they were at the moment conveying American official and private personnel away from points where danger had developed; that they had several times changed their position, moving upriver, in order to avoid danger; and that they

were attacked by Japanese bombing planes. With regard to the attack, a responsible Japanese naval officer at Shanghai has informed the Commander-in-Chief of the American Asiatic Fleet that the four vessels were proceeding upriver; that a Japanese plane endeavored to ascertain their nationality, flying at an altitude of three hundred meters, but was unable to distinguish the flags; that three Japanese bombing planes, six Japanese fighting planes, six Japanese bombing planes, and two Japanese bombing planes, in sequence, made attacks which resulted in the damaging of one of the American steamers, and the sinking of the U. S. S. *Panay* and the other two steamers.

"Since the beginning of the present unfortunate hostilities between Japan and China, the Japanese Government and various Japanese authorities at various points have repeatedly assured the Government and authorities of the United States that it is the intention and purpose of the Japanese Government and the Japanese armed forces to respect fully the rights and interests of other powers. On several occasions, however, acts of Japanese armed forces have violated the rights of the United States, have seriously endangered the lives of American nationals, and have destroyed American property. In several instances, the Japanese Government has admitted the facts, has expressed regrets, and has given assurance that every precaution will be taken against recurrence of such incidents. In the present case, acts of Japanese armed forces have taken place in complete disregard of American rights, have taken American life, and have destroyed American property both public and private.

"In these circumstances, the Government of the United States requests and expects of the Japanese Government a formally recorded expression of regret, an undertaking to make complete and comprehensive indemnifications; and an assurance that definite and specific steps have been taken which will ensure that hereafter American nationals, interests and property in China will not be subjected to attack by Japanese armed forces or unlawful interference by any Japanese authorities or forces whatsoever."

Following is the text of a note handed to the American Ambassador to Japan, Mr. Joseph C. Grew, by the Japanese Minister for Foreign Affairs on December 24, 1937:

"DECEMBER 24, 1937.

"MONSIEUR L'AMBASSADEUR,

"Regarding the unfortunate incident occurring on the Yangtze River about twenty-six miles above Nanking on the 12th instant, in which Japanese naval aircraft attacked by mistake the U. S. S. *Panay* and three merchant ships belonging to the Standard Oil Company of America, causing them to sink or burn with the result that there were caused casualties among those on board, I had the honor previously to send to Your Excellency my note dated the fourteenth of December. Almost simultaneously, however, I received Your Excellency's note No. 838, which was sent by the direction of the Government of the United States, and which, after describing the circumstances prior to the occurrence of the incident, concludes that the acts of the Japanese forces in the attack were carried out in complete disregard of the rights of the United States, taking American life and destroying American property, both public and private; and which states that, 'in these circumstances, the Government of the United States requests and expects of the Japanese Government a formally recorded expression of regret, and an undertaking to make complete and comprehensive indemnifications, and an assurance that definite and specific steps have been taken which will ensure that hereafter American nationals, interests, and property in China will not be subjected to attack by Japanese armed forces or unlawful interference by any Japanese authorities or forces whatsoever.'

"As regards the circumstances surrounding the present unfortunate incident, I desire to state that while it is concluded in Your Excellency's note that the incident resulted from disregard of American rights by Japanese armed forces, it was entirely due to a mistake, as has been described in my note above-mentioned. As a result of the thorough investigations which have been continued since then in all possible ways to find out the real causes, it has now been

fully established that the attack was entirely unintentional. I trust that this has been made quite clear to Your Excellency through the detailed explanations made to Your Excellency on the 23rd instant by our naval and military authorities.

"With reference to the first two items of the requests mentioned in Your Excellency's note, namely, a recorded expression of regret, and indemnifications, no word needs to be added to what I have said in my afore-mentioned note. As regards the guarantee for the future, I wish to inform Your Excellency that the Japanese Navy issued without delay strict orders to 'exercise the greatest caution in every area where warships and other vessels of America or any other third power are present, in order to avoid a recurrence of a similar mistake, *even at the sacrifice of a strategic advantage in attacking the Chinese troops.*' Furthermore, rigid orders have been issued to the Military, Naval, and Foreign Office authorities to pay, in the light of the present untoward incident, greater attention than hitherto to observance of the instructions that have been repeatedly given against infringement of, or unwarranted interference with, the rights and interests of the United States and other third powers. And the Japanese Government are studying carefully every possible means of achieving more effectively the above-stated aims, while they have already taken steps to ascertain, in still closer contact with American authorities in China, the whereabouts of American interests and nationals, and to improve the means of communicating intelligence thereof speedily and effectively to the authorities on the spot.

"Although the attack on the man-of-war and other vessels of the United States was due to a mistake as has been stated above, the Commander of the flying force concerned was immediately removed from his post, and recalled, on the grounds of a failure to take the fullest measures of precaution. Moreover, the staff members of the fleet and the commander of the flying squadron and all others responsible have been duly dealt with according to law. The Japanese Government are thus endeavoring to preclude absolutely all possibility of the recurrence of incidents of a similar character. It needs hardly be emphasized that, of all the above-mentioned measures taken by the Japanese Government, the

recall of the commander of the flying force has a significance of special importance. It is my fervent hope that the fact will be fully appreciated by the Government of the United States that this drastic step has been taken solely because of the sincere desire of the Japanese Government to safeguard the rights and interests of the United States and other third powers.

"I avail [etc.].

"KOKI HIROTA."

The Secretary of State today instructed the American Ambassador to Japan, Mr. Joseph C. Grew, to communicate the following note to the Minister for Foreign Affairs:

"The Government of the United States refers to its note of December 14, the Japanese Government's note of December 14 and the Japanese Government's note of December 24 in regard to the attack by Japanese armed forces upon the U. S. S. *Panay* and three American merchant ships.

"In this Government's note of December 14 it was stated that 'the Government of the United States requests and expects of the Japanese Government a formally recorded expression of regret, an undertaking to make complete and comprehensive indemnifications; and an assurance that definite and specific steps have been taken which will ensure that hereafter American nationals, interests and property in China will not be subjected to attack by Japanese armed forces or unlawful interference by any Japanese authorities or forces whatsoever.'

"In regard to the first two items of the request made by the Government of the United States, the Japanese Government's note of December 24 reaffirms statements made in the Japanese Government's note of December 14 which read 'the Japanese Government regret most profoundly that it (the present incident) has caused damages to the United States' man-of-war and ships and casualties among those on board, and desire to present hereby sincere apologies. The Japanese Government will make indemnifications for all the losses and will deal appropriately with those responsible for the incident.' In regard to the third item of the request made by the Government of the United States, the

Japanese Government's note of December 24 recites certain definite and specific steps which the Japanese Government has taken to ensure, in words of that note, 'against infringement of, or unwarranted interference with, the rights and interests of the United States and other third powers' and states that 'The Japanese Government are thus endeavoring to preclude absolutely all possibility of the recurrence of incidents of a similar character.'

"The Government of the United States observed with satisfaction the promptness with which the Japanese Government in its note of December 14 admitted responsibility, expressed regret, and offered amends.

"The Government of the United States regards the Japanese Government's account, as set forth in the Japanese Government's note of December 24, of action taken by it as responsive to the request made by the Government of the United States in this Government's note of December 14.

"With regard to the facts of the origins, causes and circumstances of the incident, the Japanese Government indicates in its note of December 24 the conclusion at which the Japanese Government, as a result of its investigation, has arrived. With regard to these same matters, the Government of the United States relies on the report of findings of the Court of Inquiry of the United States Navy, a copy of which has been communicated officially to the Japanese Government.

"It is the earnest hope of the Government of the United States that the steps which the Japanese Government has taken will prove effective toward preventing any further attacks upon or unlawful interference by Japanese authorities or forces with American nationals, interests or property in China."

Following is a report received by the Secretary of the Navy from the commanding officer of the U. S. S. *Panay*, Lt. Comdr. J. J. Hughes, United States Navy:

"On Sunday, December 12, 1937, the U. S. S. *Panay* was operating under the orders of the commander, Yangtze patrol, and at that time was anchored about 15 miles above Nanking acting as a refuge for American citizens and mem-

bers of the American Embassy. The ship was accompanied by the American merchant ships *Meiping*, *Meishia*, *Meian*, and miscellaneous launches and junks. The latest orders from the commander of the Yangtze patrol to the commanding officer had been received the day before by despatch and said the commanding officer was to have complete discretion in moving the ship up or down the river.

"The ship was identified as an American vessel by two large horizontal flags, one spread over the forward top deck and one over the after top deck, both clearly visible from the air at any angle. Each of these flags measured about 18 feet in length and about 14 feet in width and had been freshly repainted. In addition to these two flags and on account of the emergency condition existing, the *Panay* had been flying her largest size ensign at the gaff both day and night whether underway or at anchor. All ensigns both horizontal and vertical were brightly illuminated all night.

"At 8:14 a. m., I observed artillery shells falling in the river about 400 yards off our starboard beam presumably from Japanese artillery although the batteries were not visible. At 8:25 a. m., I got the *Panay* underway for upriver to get clear of this firing and signalled the convoy to follow at 8:43 a. m.

"At 9:40 a. m. having resumed our journey with the *Panay* at the head of the column, followed in the order named by the *Meiping*, *Meishia*, and *Meian*, two groups of Japanese soldiers were sighted on the left (north) bank. They waved hand flags at the *Panay* and seemed to want to communicate with us. Accordingly the *Panay* hove to and a Japanese armed tender came alongside carrying Lt. Sheseyo Murakami and about 90 men, most of whom were armed with machine guns. Lieutenant Anders, my executive officer, met this officer at the gangway as he stepped on board accompanied by his sword bearer and two privates with fixed bayonets. Lieutenant Anders informed me that the officer desired to speak to me so I turned the conn over to Lieutenant Anders and went to the gangway.

Lieutenant Murakami asked me where the *Panay* was going and I said to a point upriver 28 miles from Nanking.

He said 'Why are you going there,' to which I replied 'To keep clear of artillery fire.' He asked me about the three merchant ships and I informed him that they were American ships under my protection. His next question was about the Chinese troops holding solidly to which I said that the United States was friendly to both Japan and China and therefore I could not give him any information about the Chinese Army. This conversation was witnessed by Second Secretary, Mr. George Atcheson, Jr., of the American Embassy, Nanking, China. Lieutenant Murakami then invited me to repay his call ashore, which invitation I respectfully declined. At 9:53 a. m. the Japanese tender cleared the side.

"At 9:54 a. m. the *Panay* again resumed her way up the river. At 11 a. m. I anchored the *Panay* at a point 20 miles up river from Nanking and about 221 miles above Woosung in a broad open space in the river. My reason for anchoring there was simply to keep out of the way of the contending armies. This location seemed highly desirable. We were easily visible, especially accompanied as we were by three merchant ships, for miles around on every side. It seemed unlikely that any troops would try to cross the river in our vicinity. In selecting this spot I had in mind primarily the safety of the *Panay* and the refugees whom she was carrying, but also the safety and well-being of the American ships in the convoy and their personnel. Immediately upon anchoring I posted sentry lookouts for airplanes and troop movements. At 1 p. m. I allowed a party of about eight men to visit the *Meiping* nearby. These men were still on board the *Meiping* when the attack started and were therefore unable to return to the ship.

"At about 1:27 p. m. the lookout called down that two planes were in sight, altitude about 4,000 feet. The weather was clear with good visibility and no wind. The planes were clearly visible in spite of their altitude which may not have been as high as reported to me at that time. I had no idea whatsoever that the planes intended to attack us. About this time I went up to the bridge with Chief Quartermaster John Lang in order to keep a better lookout for further plane approaches. About 1:29 p. m. I looked out the door of the bridge to pick up again the two planes I

had originally seen and was astonished to discover that both were rapidly losing altitude in a direction toward us. Almost immediately they appeared to go into power dives. Almost immediately a bomb seemed to strike directly over our heads ripping a big hole in the roof of the bridge. I lost consciousness for what must have been only a minute or two; when I came to I discovered myself on the deck of the bridge badly stunned with my head covered with blood and my right leg painfully injured at the hip, making it impossible for me to rise to my feet. A hole had also been broken in the deck of the bridge near where Lang and I had been standing. I asked Lang if he were injured to which he replied 'No, sir.' Not being able to determine the extent of the damage from the inside of the bridge which was completely wrecked he helped me down to the ship's galley which is on the main deck, and a good central point from which to direct operations. Before I was able to reach the galley, which was necessarily a slow process on account of my disabling wound, I heard the *Panay's* machine guns firing and realized that the crew was carrying on probably under the immediate direction of Lieutenant Anders, my executive officer. At the galley I sent Lang to notify all officers that I was in the galley incapacitated and to tell the engineer officer, Lieutenant (j. g.) Geist to let me know if we were taking water and if we could get the ship underway.

"From then on the planes bombed us continuously until about 2:25 p. m. They appeared to be attacking us in relays of two or three each. The first group that came over dive-bombed from a considerable altitude which kept them beyond the range of our Lewis machine guns. Later when the *Panay* was visibly smashed up they came much closer and not only let go their bombs from low altitudes of perhaps one or two hundred feet, but also machine-gunned our decks firing as they came down diving. I distinctly heard their guns which had a different sound from the *Panay's*. I was informed at the time that the planes were Japanese Navy planes identified by their characteristic red circle. According to my reckoning the *Panay* must have received about 24 direct hits. I could not believe it was possible for such a small ship to receive such damage and still float. I

was informed later that the first bomb which disabled me also put the forward 3-inch gun and the radio room out of action and brought down the foremast.

"At 1:58 p. m. the ship appeared to be settling quite fast; meanwhile, before the engineer officer could reach me to give me a report on the status of our propelling machinery, I heard a sharp rush of steam escaping from our steaming boiler. The engineer officer, Lieutenant Geist, reported shortly thereafter and said we could not get underway because the steaming boiler had been ruptured. About this time someone informed me that we appeared to be in danger of being run down by one of the merchant ships. I got Mr. Paxton to carry me to the door of the galley, and from what I could see I supposed that the vessel was attempting to come alongside the *Panay*, probably to take off our personnel. About that instant another storm of bombs fell both on the *Panay* and the merchant ship. The latter then abandoned her attempt to help the *Panay*. It should be remembered that attacking planes concentrated almost all their efforts on the *Panay* during at least the first half hour.

"By 2 p. m. it seemed unlikely to me that I should be able to save the ship. About 2:02 p. m. Ensign Biwerse returned and said he thought we should abandon ship, especially as he thought the job would take some time with only two small boats. Accordingly, I gave the order to abandon ship, and to start by sending the worst wounded ashore first. Boats contained only wounded except for the boats' crews, Chief Boatswain's Mate Mahlmann and several of the crew that had not been injured. They came to the galley to put me in the first boat. I protested against leaving the ship at this time, and was most unwilling to do so; but it appeared that they did not heed my protest because of my condition. With Mr. Paxton's assistance they carried me down to the deck, and laid me flat on my face across the bow of the motor sampan.

"I told Ensign Biwerse to tell Lieutenant Anders and the other officers that if the attack should cease I wanted Ensign Biwerse to remain on board with a small detail of about six uninjured men to do what they would to keep the ship from going down and that in any case Ensign Biwerse and his detail were to be the last to leave. I knew at that time

that Ensign Biwerse was the only uninjured officer although suffering from shock and had had most of his clothes blown off and believed that Lieutenant Anders and Lieutenant (j. g.) Geist were sufficiently injured to justify their leaving the ship before the last boatload. After arriving on shore I was informed both the motor sampan and pulling sampan had been machine-gunned by the attacking planes. Some time thereafter I heard the sound of a motor launch in the river close to where we were hidden in the reeds. The launch stayed in our vicinity a few minutes and then left. I cannot say whether or not they attempted to search for us because I was keeping my men out of sight and had deliberately left no debris on the beach by which we could be traced. Shortly afterwards a second launch passed.

"About this time the planes started bombing the merchant vessels. At 2:25 p. m. they ceased bombing the *Panay* altogether. It was while they were bombing the *Panay* that two of the merchant vessels were able to get underway and beach themselves.

"With only two small boats available it took many return trips to take all the personnel off the ship. Starting at 2:05 p. m. we completed the operations at a little after 3 p. m. Sometime before the ship sank I heard the rattle of machine guns and was informed that an armed Japanese boat was firing on the *Panay*. I was subsequently informed that this boat had put several men on board who remained only a few minutes and then left. I was shortly informed that the ship sank with her colors still flying at 3:54 p. m. turning over to starboard.

"While on board the roar of the bomb explosions and the pieces of debris flying around made it impossible to keep any written record of the various hits, the damage sustained, or the injury to personnel.

"There was absolutely no panic. The orders I gave were carried out exactly. The ship had the normal Yangtze gunboat general quarters station bill. We had special details for air defense which involved using only our machine guns.

"The hull had many holes when abandoned and was shipping water rather rapidly. It would have been impossible to get the ship underway to beach her because her steaming

boiler had been ruptured. Lieutenant Anders, my executive officer, with great courage and perseverance maintained the fire of all our machine guns although he had been badly wounded almost immediately in the throat, and later in the arm and both hands. He was able however, to keep his feet and maintained active charge.

"As already mentioned, I had my men abandon ship in the order of the worst wounded. First, I sent the boats to the nearest land which was covered by high reeds. I told the men that after they reached the beach they were to get in shore and hide in the reeds without, however, getting too far separated. After getting all the men off the ship and on the beach we found two Japanese planes flying fairly low overhead apparently looking for the *Panay* survivors. The reeds, however, apparently afforded us sufficient cover to remain unseen. These planes subsequently departed but shortly later bombing attacks were made on the two merchant vessels which were by now beached on the bank opposite us. The third merchant vessel had already been sunk by bombs.

"We were on an island. Lt. Arthur F. Anders, my executive officer, was by this time badly weakened from loss of blood and Lieutenant (j. g.) Geist was also badly wounded in the leg. Ensign Biwerse had escaped actual injury but was suffering somewhat from shock. I felt that under the circumstances of our urgent condition and position that I should utilize the experience and mature judgment of Capt. Frank N. Roberts, United States Army, the Assistant Military Attaché to the American Embassy in China, who had come on board at Nanking. He had escaped injury and was most anxious as an officer to assist me in any way. His ability to speak Chinese was also a valuable factor. I therefore appointed him as my immediate representative to take active physical charge under my direction and such orders as he gave were after consultation with me and by my authority and direction. I also acknowledge gratefully the kind and efficient assistance of Mr. Atcheson in the same way. It is my grateful duty to add that Captain Roberts' services were absolutely invaluable and it is impossible for me to express my full appreciation of them. I am sure that every member of the party would agree that his efficiency,

kindness, and tact, and his experience in handling an operation of this nature on shore greatly contributed to our final escape. Mr. Atcheson, who also speaks Chinese, agreed at my request to remain with the party to facilitate dealings with Chinese officials.

"At about 5:15 p. m. Second Secretary of the Embassy Mr. J. Hall Paxton, who also speaks Chinese, left our party at my request to try to get a message through either by telephone or telegraph to the American Ambassador at Hankow, informing him of our plight.

"As already mentioned, after dark all able-bodied men tracked the launch carrying the wounded around the little island close to the mainland on which we had found ourselves. In the meantime Mr. Paxton who had gone on ahead sent back coolie carriers from the first village and they carried our wounded there. At this village we engaged more coolies and set out for the next village inland, Hohsien, which was 5 miles away and 3 miles away from the river bank. When we arrived at Hohsien about midnight we were received and treated with the greatest kindness by the magistrate and all the Chinese there and were quartered in the hospital where we remained throughout the daylight. On Monday, 13 December, Ensminger, storekeeper 1st class, and Mr. Sandro Sandri, Italian journalist, died from their injuries while we were there.

"At dark that evening, 13 December, we set out for the next town, Hanshan, by junks which Captain Roberts had engaged. It was while we were at Hanshan, approximately 12 miles inland from the left (north) bank, that I received word of the American and British gunboats which had been sent to assist us and of the presence of a Japanese gunboat to guarantee us safety from further attacks. The magistrate and the Chinese residents of the second village were just as helpful as those of the first. Finding the party and rendering medical aid, they were willing to have us in spite of the fact that they thought as we did that our presence among them would draw down bombing attacks from the Japanese planes.

"We left Hanshan about noon on 14 December in the same junks in which we had arrived and reached the Yangtze river about 9:45 p. m. that night. The entire party was on

board the U. S. S. *Oahu* and H. M. S. *Ladybird* by 1 a. m. December 15. All the passengers who were on board the *Panay* were there at their own request.

"I have no complaint to make regarding the conduct of any officer or enlisted man or any passenger. In my opinion everyone acted with fine courage and initiative. I consider that the action of my officers and crew in attempting to return the fire, rendering first aid, safely evacuating all personnel, transporting the wounded, keeping together and returning as one party with the dead and wounded is sufficient evidence of their courage, discipline, and fortitude. I keenly regret that my own injury prevented me from observing individual acts of courageous conduct of which I feel certain, under the circumstances, every officer and man performed both while on board ship and during the subsequent traveling ashore. I was particularly impressed by and grateful for the high morale and cheerful and faithful manner in which my officers and men assisted one another. I deem it my duty however to comment particularly upon the cool and courageous conduct of Lt. Arthur F. Anders, my executive officer, who though wounded in several places, unable to speak and suffering severe loss of blood, kept his feet, directed the fire and supervised the abandon ship. His conduct was an inspiration to all hands. I also consider that Lt. Clark G. Grazier, Medical Corps, United States Navy, our only doctor, who was fortunately not wounded, displayed coolness, ability and resourcefulness with his treatment of the many wounded both while under fire aboard ship and under very difficult conditions ashore. His untiring efforts and professional skill undoubtedly contributed greatly to reduce the seriousness of the injuries."

Following is the text of the report of findings of the Court of Inquiry ordered to investigate the bombing and sinking of the U. S. S. *Panay*. The Secretary of the Navy announced that these findings have been approved by the Commander-in-Chief of the Asiatic Fleet:

"The Court finds as follows: 1. That on December 12, 1937, the U. S. S. *Panay*, a unit of the Yangtze patrol of the United States Asiatic Fleet, was operating under lawful orders on the Yangtze River.

"2. That the immediate mission of the U. S. S. *Panay* was to protect nationals, maintain communication between the United States Embassy, Nanking, and office of the Ambassador at Hankow, provide a temporary office for the United States Embassy staff during the time when Nanking was greatly endangered by military operations, and to afford a refuge for American and other foreign nationals.

"3. That due to intensive shell fire around Nanking the U. S. S. *Panay* had changed berth several times to avoid being hit, and on the morning of December 12, 1937, formed a convoy of Socony Vacuum Oil Co. vessels principally the S. S. *Meiping*, *Meishia* and *Meian* and proceeded up river.

"4. That adequate steps were taken at all times to assure that the Japanese authorities were informed of the movements of the U. S. S. *Panay*.

"5. That in addition to her regular complement the U. S. S. *Panay* had on board at this time four members of the American Embassy staff, four American nationals and five foreign nationals.

"6. That at 9:40 a. m. while standing upriver the U. S. S. *Panay* stopped in response to a signal from a Japanese landing boat, a Japanese Army boarding officer with guard went on board and was informed that the U. S. S. *Panay* and convoy were proceeding to anchorage 28 miles above Nanking, no warning was given of any danger likely to be encountered.

"7. That at about 11 a. m., December 12, 1937, the U. S. S. *Panay* and convoy anchored in the Yangtze River in a compact group at about mileage 221 above Woosung, 28 miles above Nanking.

"8. That the U. S. S. *Panay* was painted white with buff upper works and stacks and displayed two large horizontal flags on her upper deck awnings plus large colors at her gaff.

"9. That the Socony Vacuum ships *Meiping*, *Meishia* and *Meian* each displayed numerous horizontal and vertical American flags all of large size.

"10. That at 1:30 the crew of the U. S. S. *Panay* were engaged in normal Sunday routine and were all on board

except a visiting party of eight men on board the S. S. *Meiping*.

"11. That at about 1:38 p. m. three large Japanese twin-motored planes in a vee formation were observed at a considerable height passing overhead down river, at this time no other craft were in the near vicinity of the *Panay* and convoy and there was no reason to believe the ships were in a dangerous area.

"12. That without warning these three Japanese planes released several bombs one or two of which struck on or very close to the bow of the U. S. S. *Panay* and another which struck on or very close to the S. S. *Meiping*.

"13. That the bombs of the first attack did considerable damage to the U. S. S. *Panay* disabling the forward 3-inch gun, seriously injuring the captain and others, wrecking the pilot house and sick bay, disabling the radio equipment, and the steaming fireroom so that all power was lost and causing leaks in the hull, which resulted in the ship settling down by the head and listing to starboard, thereby contributing fundamentally to the sinking of the ship.

"14. That immediately thereafter a group of six single-engined planes attacked from ahead diving singly and appearing to concentrate on the U. S. S. *Panay*. A total of about 20 bombs were dropped, many striking close aboard and creating by fragments and concussions great damage to the ship and personnel. These attacks lasted about 20 minutes during which time at least two of the planes attacked also with machine guns, one machine-gun attack was directed against a ship's boat bearing wounded ashore causing several further wounds and piercing the boat with bullets.

"15. That during the entire attack the weather was clear with high visibility and little if any wind.

"16. That the planes participating in the attacks on the U. S. S. *Panay* and its convoy were unmistakingly identified by their markings as being Japanese.

"17. That immediately after the first bomb struck, air-defense stations were manned and the 30-caliber machine-gun battery opened fire and engaged the attacking planes throughout the remainder of the attack. The 3-inch battery

was not manned nor were any 3-inch shells fired at any time, this was in accordance with the ship's air-defense bill.

"18. That during the bombing many were injured by flying fragments and concussion and all suffered shock on the first bomb. The Captain suffered a broken hip and severe shock, soon thereafter Lieutenant Anders, executive officer, was wounded by fragments in throat and hands losing power of speech, Lieutenant, Junior Grade, Geist, engineer officer, received fragments in the legs, Ensign Biwerse had clothing blown off and was severely shocked, this included all the line officers of the ship, the Captain being disabled, the executive officer carried on his duties giving orders in writing. He issued instructions to get underway and to beach the ship. Extensive damage prevented getting underway.

"19. That at about 2 p. m., believing it impossible to save the ship and considering the number of wounded and the length of time necessary to transfer them ashore in two small boats, the Captain ordered the ship to be abandoned, this was completed by about 3 p. m. By this time the main deck was awash and the *Panay* appeared to be sinking.

"20. All severely wounded were transferred ashore in the first trips, the Captain protested in his own case. The executive officer when no longer able to carry on due to wounds left the ship on the next to last trip and Ensign Biwerse remained until the last trip.

"21. That after the *Panay* had been abandoned, Mahlmann, chief boatswain's mate and Weimers, machinist's mate first class, returned to the *Panay* in one of the ship's boats to obtain stores and medical supplies. While they were returning to the beach a Japanese power boat filled with armed Japanese soldiers approached close to the *Panay*, opened fire with a machine gun, went alongside, boarded and left within 5 minutes.

"22. That at 3:54 p. m. the *Panay*, shortly after the Japanese boarding party had left, rolled over to the starboard and sank in from 7 to 10 fathoms of water, approximate latitude 30°44′30″ north, longitude 117°27′ east. Practically no valuable Government property was salvaged.

"23. That after the *Panay* survivors had reached the left bank of the river the Captain, in view of his own injuries and the injuries and shock sustained by his remaining line officers and the general feeling that attempts would be made to exterminate the survivors, requested Capt. F. N. Roberts, United States Army, who was not injured and who was familiar with land operations and the Chinese language, to act under his directions as his immediate representative. Captain Roberts functioned in this capacity until the return of the *Panay* survivors on board the U. S. S. *Oahu* on December 15, 1937, performing outstanding service.

"24. That Messrs. Atcheson and Paxton of the United States Embassy staff rendered highly valuable services on shore where their knowledge of the country and language, coupled with their resourcefulness and sound advice, contributed largely to the safety of the party.

"25. That after some 50 hours ashore, during which time the entire party suffered much hardship and exposure somewhat mitigated by the kindly assistance of the Chinese, they returned and boarded the U. S. S. *Oahu* and H. M. S. *Ladybird.*

"26. That from the beginning of an unprecedented and unlooked for attack of great violence until their final return, the ship's company and passengers of the U. S. S. *Panay* were subjected to grave danger and continuous hardship, their action under these conditions was in keeping with the best traditions of the naval service.

"27. That among the *Panay* passengers, Mr. Sandro Sandri died of his injuries at 1:30, December 13, Messrs. J. Hall Paxton, Emile Gassie and Roy Squires were wounded.

"28. That early in the bombing attacks the Standard Oil vessels got under way. *Meiping* and *Meishia* secured to a pontoon at the Kiayuan wharf, the *Meian* was disabled and beached further down river on the left bank. All these ships received injuries during the first phases of the bombing. Serious fires on the *Meiping* were extinguished by the *Panay* visiting party of eight men who were unable to return to their ship.

"29. That after attacks on the *Panay* had ceased the *Meiping* and *Meishia* were further attacked by Japanese bombing planes, set on fire and destroyed. Just previous to this bombing Japanese Army units on shore near the wharf attempted to avert this bombing by waving Japanese flags. They were not successful and received several casualties. It is known that Captain Carlson of the *Meian* was killed and that Messrs. Marshall, Vines, and Pickering, and Squires were wounded. Casualties among the Chinese crews of these vessels were numerous but cannot be fully determined.

"30. That the following members of the *Panay* crew landed on shore from the *Meiping* after vainly attempting to extinguish oil and gasoline fires on board: V. F. Puckett, chief machinist's mate, J. A. Granes, gunner's mate first class, J. A. Dirnhoffer, seaman first class, T. A. Coleman, chief pharmacist's mate, J. A. Bonkowski, gunner's mate third class, R. L. Borwing, electrician's mate third class, J. L. Hedge, fireman first class, and W. T. Hoyle, machinist's mate second class. These men encountered Japanese soldiers on shore who were not hostile on learning they were Americans.

"31. That all of the *Panay* crew from the *Meiping*, except J. L. Hodge, fireman first class, remained in one group ashore until the following day when they were rescued by H. M. S. *Bee*. Hodge made his way to Wuhu and returned Shanghai via Japanese naval plane on December 14.

"32. That in the searching for and rescuing the survivors, Rear Admiral Holt, Royal Navy, and the officers and men of H. M. S. *Bee* and H. M. S. *Ladybird* rendered most valuable assistance under trying and difficult conditions, thereby showing a fine spirit of helpfulness and cooperation.

"33. That Charles L. Ensminger, ship's cook first class, died at 1:30 p. m., December 13, at Hohsien, China, from wounds received during the bombing of the U. S. S. *Panay* and that his death occurred in line of duty.

"34. That Edgar C. Hulsebus, coxswain, died at 6:30 a.m., December 19, at Shanghai, China, from wounds received during the bombing of the U. S. S. *Panay* and that his death occurred in line of duty.

"35. That Lt. Comdr. James J. Hughes, Lt. Arthur F. Anders, Lt. (Jr. Gr.) John W. Geist, John H. Lang, chief quartermaster, Robert R. Hebard, fireman first class, Kenneth J. Rice, electrician's mate third class, Carl H. Birk, electrician's mate first class, Charles S. Schroyer, seaman first class, Alex Kozak, machinist's mate second class, Peres D. Zeigler, ship's cook third class, and Newton L. Davis, fireman first class, were seriously injured in line of duty.

"36. That Lt. Clark G. Grazier, Medical Corps, Ensign Denis H. Biwerse, Charles S. Adams, radioman second class, Tony Barba, ship's cook third class, John A. Bonkowski, gunner's mate third class, Ernest C. Branch, fireman first class, Raymond L. Browning, electrician's mate third class, Walter Cheatham, coxswain, Thomas A. Coleman, chief pharmacist's mate, John A. Dirnhoffer, seaman first class, Yuan T. Erh, mess attendant first class, Fred G. Fichtenmayer, carpenter's mate first class, Emery F. Fisher, chief watertender, Michael Gerent, machinist's mate second class, Cecil B. Green, seaman first class, John L. Hodge, fireman first class, Fon B. Hoffman, watertender second class, Karl H. Johnson, machinist's mate second class, Carl H. Kerske, coxswain, Peter H. Klumpers, chief machinist's mate, William P. Lander, seaman first class, Ernest R. Mahlmann, chief boatswain's mate, William A. McCabe, fireman first class, Stanley W. McEowen, seaman first class, James H. Peck, quartermaster second class, Reginald Peterson, radioman second class, Vernon F. Puckett, chief machinist's mate, King F. Sung, mess attendant first class, Harry B. Tuck, seaman first class, Cleo E. Waxler, boatswain's mate second class, John T. Weber, yeoman first class, and Far Z. Wong, mess attendant first class, were slightly injured in line of duty.

"The Court of Inquiry was composed of: Capt. H. V. McKittrick, United States Navy; Comdr. M. L. Deyo, United States Navy; Lt. Comdr. A. C. J. Sabalot, United States Navy, and Lt. C. J. Whiting, United States Navy, *Judge Advocate*."

II

INTERNATIONAL COMMITTEE FOR THE APPLICATION OF THE AGREEMENT REGARDING NON-INTERVENTION IN SPAIN

Resolution relating to the Scheme of Observation of the Spanish Frontiers by Land and Sea,* Adopted at London, March 8, 1937

The Governments represented on the International Committee † for the application of the Agreement regarding Non-Intervention in Spain having approved the resolution passed on the 16th February, 1937, by the Committee to the effect that the Agreement should be extended as from midnight the 20th–21st February, 1937, to cover the recruitment in, the transit through, or the departure from, their respective countries of persons of non-Spanish nationality proposing to proceed to Spain, Spanish Possessions or the Spanish Zone of Morocco for the purpose of taking part in the present conflict; and

(2) Having deemed it expedient to establish a system of observation round the frontiers of Spain, the Spanish Possessions and the Spanish Zone of Morocco for the purpose of ascertaining whether the Agreement is being observed; and

(3) His Majesty's Government in the United Kingdom having accepted an invitation by the Portuguese Government to observe the carrying out of the Agreement in Portugal, and for this purpose to appoint British observers to be attached to His Majesty's Embassy in Lisbon; and

(4) His Majesty's Government in the United Kingdom having informed the Committee that they are satisfied that

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* British White Paper, Spain No. 1 (1937), *Cmd.* 5399.

† List of countries represented on the International Committee: Albania, Austria, Belgium, United Kingdom, Bulgaria, Czechoslovakia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Irish Free State, Italy, Latvia, Lithuania, Luxemburg Netherlands, Norway, Poland, Portugal, Roumania, Sweden, Turkey, Soviet Union, Yugoslavia.

the agreement reached between them and the Portuguese Government as a result of this invitation is fully adequate from every point of view to enable His Majesty's Government to discharge the responsibilities which they have agreed to assume, and that they will communicate to the International Committee any information which may be reported to them by His Majesty's Ambassador at Lisbon regarding infringements of the Non-Intervention Agreement; and

(5) The Committee being fully confident in the discharge by His Majesty's Government in the United Kingdom of these responsibilities in regard to the Portuguese frontiers, in collaboration with the Portuguese Government, agrees on behalf of the Governments represented thereon, that the system of observation on the Franco-Spanish frontier, the frontier between Spain and Gibraltar, and the maritime frontiers of Spain, the Spanish Possessions, and the Spanish Zone in Morocco, shall be carried out in the manner indicated in the Annex attached hereto unless otherwise amended or determined.

Annex

I. The organisation of the system of observation

Establishment of the "International Board for Non-Intervention in Spain."

1. The system of observation will be administered on behalf of the participating Governments by a Board to be known as the "International Board for Non-Intervention in Spain," and hereinafter referred to as the Board, consisting of a Chairman, to be appointed by the International Committee, and of five members nominated by the Representatives of the Governments of the United Kingdom, France, Germany, Italy and the U. S. S. R.

The functions of the Board.

2. The Board will have power to decide all questions relating to the administration of the scheme, but it will be the duty of the Board to submit all matters raising questions of principle to the International Committee for decision by that body on behalf of the participating Governments.

II. THE ESTABLISHMENT OF A SYSTEM OF OBSERVATION ON THE SPANISH LAND FRONTIERS

The establishment of observation on the Spanish land frontiers.

3. In view of the fact that a special arrangement has been reached between the United Kingdom and Portuguese Governments, as referred to in paragraphs 3 and 4 of the foregoing Resolution, regarding the Portuguese frontiers, there shall be stationed on the French side of the Franco-Spanish frontier and on the British side of the Gibraltar-Spanish frontier an international staff charged with the observation of the enforcement of the Non-Intervention Agreement.

The regime to be established on the frontiers.

4. For the purposes of the scheme, the Franco-Spanish frontier will be divided into zones, each of which will be in the charge of an "Administrator" who will be responsible for the system of observation to be established in that zone to the "Chief Administrator" who will be responsible for the whole frontier. Part of the international staff will be stationed at railway and road crossings over the frontier, and part will be equipped on a mobile basis. These officials will work in close collaboration with the appropriate French authorities. As there is only one crossing from Gibraltar into Spain, the necessary observation will be carried out by one "Administrator" with a small staff of subordinate rank.

The facilities to be accorded to, and the duties of, Administrators under the land observation scheme.

5. The facilities to be accorded to, and the duties of, the Administrators have been defined as follows:

(1) The Chief Administrator, Administrators, and their subordinates shall enjoy the immunities normally accorded to diplomatic officers, and the Chief Administrator shall have the right of free communication with the Board. Further, the Chief Administrator and the Administrators and their subordinates shall be granted by the Governments of the countries concerned full facilities to enable them to exercise the rights and to discharge the duties assigned to them, and, in particular, those rights and duties enumerated in Sections (2) and (3) below.

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(2) These facilities will include—

(*a*) the right of free entry at any time into railway establishments, and similar premises;

(*b*) the right, in accordance with (3) below, of making such inspections as they may think proper in the premises referred to in (*a*) above, for the purpose of establishing whether any arms or war material are being exported into Spain or whether foreign nationals are entering that country for the purpose of taking service in the present conflict, in contravention of the Agreement for Non-Intervention;

(*c*) the right (i) to call upon the responsible authorities for documents relating to the nature of particular consignments of goods, and (ii) to examine the passports of persons proceeding to Spain;

(*d*) the grant of the same priority for telephone and telegraph services as are accorded to diplomatic officers stationed in, or national officials of, the country in question.

(3) It will be the duty of the Chief Administrator in France and of the Administrator at Gibraltar—

(*a*) when called upon by the Board, to investigate, and to report on, any particular case in respect of which a complaint has been submitted to the Committee by the Representative of a Government which is a party to the Non-Intervention Agreement;

(*b*) whenever, as the result of investigations carried out by the international staff, on their own initiative, he has satisfied himself that a consignment of arms or war material (including aircraft) has been exported into Spain or that foreign nationals have entered Spain for the purpose of taking service in the present conflict, in contravention of the Agreement, to submit forthwith identical reports in regard thereto—

(i) to the Board;

(ii) to an official nominated for the purpose by the Government of the country in which he is stationed.

(4) In addition to the rights and duties set out above, the Chief Administrator in France and the Administrator in Gibraltar will have the right at all times to communicate direct with the Board on any matter connected with the discharge of their duties.

III. THE ESTABLISHMENT OF A SYSTEM OF OBSERVATION OF SHIPS HAVING THE RIGHT TO FLY THE FLAGS OF THE PARTICIPATING COUNTRIES, PROCEEDING TO THE PORTS OF SPAIN OR THE SPANISH DEPENDENCIES

The general character of the scheme for sea observation.

6. All ships having the right to fly the flags of the countries which are parties to the Non-Intervention Agreement (other than naval vessels) proceeding to Spain or to one of the Spanish Possessions, or to the Spanish Zone in Morocco, will—

(*a*) subject to such exceptions as are set out in the following paragraphs in this chapter, embark at one of the ports specified in paragraph 12 below two or more "Observing Officers" appointed by the International Committee whose duty it will be to observe the unloading of the ship in Spanish ports, or

(*b*) at the discretion of the Administrator or Deputy Administrator in charge of the Observation Port in question, embark one Observing Officer in the case of small ships, ships carrying cargo in bulk, or ships in ballast, the Governments concerned taking such steps as are necessary to require the owners and masters of ships having the right to fly their respective flags to comply with the provisions set out in the following paragraphs.

The duties of the Chief Administrator.

7. The general organisation of the system of observation described in paragraph 6 above will be entrusted to a "Chief Administrator." It will be the duty of the Chief Administrator to determine the allocation of the "Observing Officers" as between one Observation Port and another in the light of the day to day requirements of each port. Subject to the general direction of the Board, the Chief Administrator will be responsible for all questions relating to the discipline and posting of the international staff employed at the Observation Ports.

The duties of the Administrators and Deputy Administrators.

8. At each of the Observation Ports enumerated in paragraph 12 below, an "Administrator" or "Deputy Administrator" will, subject to the general direction of the Chief

Administrator referred to in paragraph 7 above, be responsible for the organisation of the observation scheme in that port, and in particular for arranging for the embarkation of Observing Officers on, and their disembarkation from, ships having the right to fly the flags of the countries which are parties to the Non-Intervention Agreement, proceeding to Spanish ports that have called at the Observation Port in question for the purpose of complying with the scheme of observation.

9. It will be the duty of each Administrator or Deputy Administrator in charge of an Observation Port—

(*a*) to determine in the light of actual conditions how many Observing Officers should be embarked in each vessel calling at the port for the purpose of submitting to observation;

(*b*) to notify to the Board the names of all vessels bound from his port for Spanish ports which had embarked Observing Officers and the names of those officers, it being the duty of the Board to communicate this information to the Governments taking part in the naval observation scheme;

(*c*) to submit a report to the Board, for transmission to the International Committee whenever one of the Observing Officers reports to him that he has witnessed in a Spanish port either the unloading of arms or war material, or the disembarkation of foreign nationals entering that country, in contravention of the Non-Intervention Agreement, for the purpose of taking service in the present conflict from a vessel in which he was stationed;

(*d*) to submit to the Chief Administrator, for the information of the Board, periodical reports in regard to all vessels on which Observing Officers have been embarked and from which no cargo or passengers have been landed in Spanish ports in contravention of the Non-Intervention Agreement.

The duties to be imposed on the masters of ships, the facilities to be granted to, and the duties of, the Observing Officers.

10. The duties to be imposed on the masters of ships having the right to fly the flags of the countries which are parties to the Non-Intervention Agreement, and the facili-

ties to be granted to, and the duties of, the Observing Officers will be as follows:

(*a*) the participating Governments will instruct the masters of all ships having the right to fly the flags of their respective countries, before proceeding to a Spanish port, to call at one of the Observation Ports specified in paragraph 12 below for the purpose of embarking Observing Officers, and, having done so, to give all necessary facilities to those officers to enable them to discharge the duties set out in (*c*) below, and to disembark such officers at another port indicated by the Administrator or Deputy Administrator in accordance with paragraph 18 below, these facilities to include the right—

(i) at any convenient time during the voyage to obtain all necessary information from the master as to the cargo carried which is consigned to Spanish ports, and to inspect papers relating thereto;

(ii) at any convenient time during the voyage to obtain all necessary information from the master, and, in his presence, or in that of an officer nominated by him for the purpose, to interrogate passengers, officers and crew, proceeding to Spanish ports and to examine the passports of passengers and the identity papers of the officers and crew;

(iii) to be present at the unloading of any goods or disembarkation of any persons in a Spanish port, and to require the master to have opened for inspection any package which is being unloaded, and which the Observing Officer has reasonable grounds for suspecting to contain war material sent in contravention of the Non-Intervention Agreement, and to require the master to have any necessary unpacking, repacking and sealing-up done;

(*b*) the Chief Administrator, Administrators, and Deputy Administrators and their subordinates will be granted by the participating Governments the immunities normally accorded to diplomatic and consular officers; the right of free communication with the Board will be granted to the Chief Administrator, and to Administrators and to Deputy Administrators, subject to any directions issued by the Board or (in the two last-named cases) by the Chief Ad-

ministrator; and the Chief Administrator, Administrators and Deputy Administrators and their subordinate staff will be granted full facilities to enable them to exercise the rights and to discharge the duties assigned to them, and, in particular, these officers will be granted the same priority for telephone and telegraph services as are accorded to diplomatic officers stationed in, or to the national officials of, the country in question; and the Observing Officers, when engaged on duty at sea, will be granted the same priority for telephone and telegraph services as are granted to the service messages of the master of the vessel on which they have been embarked;

(*c*) The duties of the Observing Officers, when on board vessels in Spanish ports, will be to take, within the limit of the facilities accorded to them under (*a*) above, all steps which they may consider necessary to satisfy themselves:

(i) whether any arms or war material of the classes covered by the Non-Intervention Agreement are being unloaded; and

(ii) whether in contravention of the Non-Intervention agreement, any foreign nationals intending to take service in the present conflict are being disembarked;

(iii) on leaving any Spanish port that no passenger or member of the crew, who may have left the ship while in port, has failed to return in contravention of the Non-Intervention Agreement;

(*d*) The participating Governments will issue any instructions which may be necessary to require any owners and masters of vessels having the right to fly flags of their respective countries to take all steps in their power to prevent the landing in a Spanish port, in contravention of the Non-Intervention Agreement, of any arms or war material or passengers which or who the Observing Officers may ascertain are being carried by the vessel in question;

(*e*) The Observing Officers, on their disembarkation, will immediately submit to the Administrator or Deputy Administrator in charge of the nearest Observation Port a report in writing, stating either that no offence against the Non-Intervention Agreement has been committed by the ship in which they had been stationed, or, if such an offence has been committed, what is the nature of the offence;

(*f*) The participating Governments will take such legal or other proceedings as may be found appropriate against the owners or masters of vessels in cases indicated in (*e*) above, and in due course will submit a report to the Board regarding any penalties inflicted.

The Observation Ports.

11. It is an essential part of the scheme that the Observation Ports at which the ships having the right to fly the flags of the countries which are parties to the Non-Intervention Agreement will embark Observing Officers should be determined in accordance with definite rules, though, in particular cases, or particular classes of cases, the Administrators in charge of any of the principal Observation Ports referred to in paragraph 13 below will have the right to make special arrangements for the embarkation of Observing Officers at other ports to suit, as far as possible, the convenience of the shipping concerned from the commercial point of view, subject to the general provisions contained in paragraph 6 above.

12. At the outset of the scheme, the obligation to be laid on merchant ships proceeding to Spanish ports (other than the Canary Islands, which are dealt with in paragraph 14 below), will be in accordance with the following rules:

(*a*) If the ship is passing in either direction through the Straits of Gibraltar before calling at any Spanish port she will call at Gibraltar, it being understood that *this rule overrides all the following rules, which therefore only apply to vessels which do not come within its scope;*

(*b*) If the ship is passing through the English Channel on her way to a Spanish port from a port lying to the north of Dover, she will call either at Dover or at the Downs;

(*c*) If the ship (not being a ship covered by (*b*) above) proceeds to a Spanish port from a Channel port south of Dover, she will call at Cherbourg, unless the ship is proceeding from a port between Cherbourg and Brest, in which case she will be dealt with under (*d*) below;

(*d*) If the ship is proceeding from the Irish Free State or from Northern Ireland or from the Irish and Bristol Channels, or from a port between Cherbourg and Brest, she will call at Brest;

(*e*) If the ship (not being a ship covered by (*b*) above) proceeds to a Spanish port from a French Atlantic or Biscayan port south of Brest, she will call at Le Verdon;

(*f*) If the ship is approaching westward through the Mediterranean or from a port in the Mediterranean, East of Longitude 12° East, she shall call at Palermo, unless for commercial reasons, she is in any case proceeding to Marseilles, in which case it shall be permitted to embark Observing Officers at that port;

(*g*) If the ship (not being a ship covered by (*f*) above) proceeds to a Spanish port from a North African port west of Longitude 12° East, she will call at Oran;

(*h*) If the ship (not being a ship covered by (*f*) above) proceeds to a Spanish port from a port on the French or Italian Coast between Marseilles and Longitude 12° East, or from Corsica or Sardinia, she will call at Marseilles;

(*i*) If the ship (not being a ship covered by (*f*) above) proceeds to a Spanish port from a French Mediterranean port west of Marseilles, she will call at Cette;

(*k*) If the ship is approaching from the west of Longitude 15° West, *or* is approaching in the Atlantic from the southward of Latitude 28° N., she will call at one of the following ports, viz., Madeira, or Gibraltar, or Lisbon;

(*l*) If the ship is coming from a port on the Atlantic seaboard of Morocco, she will call at Gibraltar, or, in the case of ships proceeding to Spanish ports north of Portugal, at Lisbon;

(*m*) If the ship is coming from a Portuguese port, she will call at Lisbon.

Definition of principal Observation Ports.

13. The Observation Ports which are to be regarded as principal Observation Ports at the outset of the scheme are the following:

The Downs (or Dover).
Cherbourg.
Lisbon.
Gibraltar.
Marseilles.
Palermo.
Madeira.

Special provisions in relation to the Canary Islands.

14. The Committee accepts the principle that observation shall be applied with equal efficiency to all parts of Spanish territory. The method of applying observation in the case of the Canary Islands presents special difficulty, but a system of observation will be determined by the International Committee not later than the 31st March, 1937, and will be brought into operation at the earliest possible date thereafter.

The provision of accommodation at sea for Observing Officers.

15. The owners of vessels having the right to fly the flags of the countries which are parties to the Non-Intervention Agreement, proceeding to Spanish ports, will be under an obligation to provide accommodation for the Observing Officers equivalent to that normally provided in corresponding vessels belonging to the same nation, for officers such as mates or, in a passenger ship (*i. e.*, a ship having accommodation for more than twelve passengers), for first-class passengers. In cases where there is no accommodation classed as first class, the accommodation to be provided will be of the highest class in the ship.

16. Shipowners will be placed under an obligation to provide messing similar to that provided for the masters of the ships concerned or for first-class passengers, for which payment will be made from the International Fund referred to in paragraph 52 below at a standard rate or rates to be approved by the International Committee on the recommendation of the Board.

17. The Observing Officers will be carried on the same conditions with regard to liability for life and property as are passengers on the vessel in question.

The disembarkation of Observing Officers.

18. Subject to the approval of the Chief Administrator referred to in paragraph 7 above, the Administrator or Deputy Administrator in charge of each Observation Port will have the right to require the master of a ship which has embarked Observing Officers to disembark them at any port which would not entail an unreasonable deviation after

the vessel has finally quitted Spanish waters. To this end the master of such a ship will be put under an obligation to disembark the Observing Officers (at the discretion of the Administrator or Deputy Administrator at the port of embarkation) either at the Observation Port nearest to the route that the master intends to follow after leaving Spanish waters, or at any other port which does not entail more than 50 sea miles' additional steaming.

Special arrangements for regular trades.

19. Shipowners engaged in regular trade with Spanish ports will be permitted, should they so desire, to arrange with the Board for Observing Officers to be stationed continuously on board their vessels, the additional expenditure involved being defrayed by the shipowner concerned. It will be the duty of the Board to arrange for such Observing Officers to be changed at reasonably frequent intervals.

No liability in respect of delay or diversion of ships.

20. No payment will be made from the International Fund referred to in paragraph 52 below to shipowners in respect of delay or diversion occasioned by the necessity to embark or disembark Observing Officers, provided either—

(*a*) that the Administrator or Deputy Administrator in charge of the Observation Port concerned embarks the Observing Officer or Officers at the earliest possible moment, and, in any case, not later than four hours after the master or agent of the ship shall have reported its arrival to the Administrator or Deputy Administrator in charge of the port; or

(*b*) that the provisions in (*a*) above will not apply in those cases where the special arrangements indicated in paragraph 11 above have been brought into operation; or

(*c*) that, if the Administrator or Deputy Administrator is unable to comply with (*a*) above, he will hand to the master of the ship a document certifying that he called at the port in order to comply with the scheme and that no Observing Officers were available to be embarked in his ship, the Administrator or Deputy Administrator in all such cases reporting the circumstances immediately to the Board.

Exemption of ships from dues in certain cases.

21. The Representatives of the Governments of the countries in which the Observation Ports are situated will consult with one another with a view to reaching agreement, on behalf of their respective Governments, (*a*) for the exemption, on a mutual basis, of ships calling at those ports merely for the purpose of embarking and disembarking Observing Officers, from dues and other charges (excluding pilotage) normally paid by ships entering those ports, or, (*b*) if this is not possible, for the reduction of these charges to an equal extent in each of the countries concerned. In so far as such exemptions or reductions cannot be secured, the expenditure involved, together with expenditure incurred on pilotage, except in those cases in which the ship would in any case for commercial reasons have called at the port in question, will be defrayed from the International Fund referred to in paragraph 52 below.

22. The Administrators and Deputy Administrators in charge of Observation Ports will arrange, wherever possible, for Observing Officers to be embarked in such positions as will not necessitate the ships in question incurring either pilotage or dues.

IV. THE ESTABLISHMENT OF A SYSTEM OF NAVAL OBSERVATION OF THE COASTS OF SPAIN AND THE SPANISH DEPENDENCIES

The general character of the scheme for naval observation.

23. In order to ensure that the procedure, prescribed in paragraph 6 above and subsequent paragraphs, in regard to the scheme for sea observation is duly observed, a system of naval observation will be established around the Spanish coasts.

The Powers by which naval observation will be exercised.

24. The duty of naval observation will be undertaken by the Governments of the United Kingdom, France, Germany and Italy.

The establishment of Observation Zones.

25. For the purpose of naval observation the Spanish coasts will be divided into zones, and the responsibility for observation within each zone will rest exclusively upon the Naval Power exercising observation in that zone.

The delimitation of the Observation Zones.

26. At the outset of the scheme, for the purposes indicated in paragraph 25 above, the Spanish coasts will be divided into the following zones:

A. On the north coast of Spain from the French frontier to Cape Busto.
B. On the north-west coast of Spain from Cape Busto to the Portuguese frontier.
C. On the south coast of Spain from the Portuguese frontier to Cape De Gata.
D. On the south-east coast of Spain from Cape De Gata to Cape Oropesa.
E. On the east coast of Spain from Cape Oropesa to the French frontier.
F. The Spanish-Moroccan coast.
G. The Islands of Iviza and Majorca.
H. The Island of Minorca.[1]

27. The duties of naval observation within each zone will only be exercised within a distance of ten sea miles from any point on the Spanish coast.

The allocation of the Observation Zones among the naval Powers concerned.

28. At the outset of the scheme responsibility for the observation zones will be allocated as follows:

A. United Kingdom.
B. France.
C. United Kingdom.
D. Germany.
E. Italy.
F. France.
G. France
H. Italy.

The establishment of a special régime in the territorial waters of the countries adjacent to Spain.

29. In order to avoid the risk of ships escaping observation by entering Spanish territorial waters direct from the

[1] The question of the establishment of naval observation around the Canary Islands will be dealt with in accordance with the principles set out in paragraph 14 above.

territorial waters of one of the adjacent countries, the Governments of the adjacent countries will themselves exercise observation over ships passing through these waters. The Governments of the adjacent countries will in due course notify to the International Committee the steps which they have severally taken to give effect to this arrangement, and will communicate to the Committee particulars regarding any infringements of the Non-Intervention Agreement which may be detected in this manner.

Duties of the Powers undertaking naval observation.

30. Each of the Governments exercising naval observation will—

(*a*) report immediately to the International Committee the arrival in any Spanish port in one of the zones for which it is responsible of any ship the name of which has not been notified as having submitted to observation, and will notify to the International Committee the name of any ship which refuses to submit to observation, when the need for such observation has been pointed out to it in the manner prescribed in paragraph 38 below;

(*b*) submit periodical reports to the International Committee, giving full particulars regarding the arrival of all ships entering Spanish ports within the zones for which it is responsible.

The method of observation to be adopted.

31. The actual method by which observation will be exercised in each zone will be left to the discretion of the Government to whom responsibility for that zone is allotted, subject to the qualification that, if any Government desires to make special arrangements to control the movements of ships in a manner such as that indicated in paragraph 36 below, it shall first obtain the consent of the International Committee.

Distance from coast at which naval observation will be conducted.

32. Ships having the right to fly the flags of the countries which are parties to the Non-Intervention Agreement, proceeding to Spanish ports will only be liable to the system of naval observation prescribed in paragraph 23 above when

they are not more than ten sea miles from the nearest point on the Spanish coast. Further such ships will only be subject to naval observation by the naval vessels of the particular Power which has accepted responsibility for observation in the zone in question.

The use of special flags in connection with the scheme.

33. The naval vessels, while actually engaged in the task of naval observation, will fly the pennant which has already been adopted under the terms of the North Sea Fisheries Convention. Ships which have the right to fly the flags of the countries which are parties to the Non-Intervention Agreement will, when proceeding to Spanish ports, after having embarked Observing Officers at one of the Observation Ports, or having, in lieu thereof, been granted a certificate in the manner prescribed in paragraph 20 above, fly also a specially agreed pennant to indicate that they have complied with the procedure laid down in the paragraph referred to above.

34. The mere fact that a ship having the right to fly the flag of any of the countries which are parties to the Non-Intervention Agreement, when approaching a Spanish port, is flying the specially agreed pennant referred to in paragraph 33 above, will not be regarded by the vessels engaged in naval observation as affording evidence that the ship in question is in fact carrying Observing Officers, and the naval vessels concerned will take all necessary steps, as laid down in paragraph 37 below, to verify the character of the ship in question.

35. Severe penalties will be imposed by the participating Governments on the masters of ships, having the right to fly their respective flags who fly on their ships the specially agreed pennant referred to in paragraph 33 above, if there are no Observing Officers on board their vessels, or unless they have been furnished with a certificate in accordance with paragraph 20 (*c*) above.

The establishment of focal areas in certain cases.

36. In order to simplify the work of naval observation, the Powers undertaking that observation may establish in the approaches to some or all of the zones focal areas through

which all ships having the right to fly the flag of the countries which are parties to the Non-Intervention Agreement, proceeding to ports within those zones would be required to pass, but, as stated in paragraph 31 above, such focal areas will not be established without the prior approval of the International Committee.

The duties and rights of officers commanding vessels taking part in the scheme.

37. The Governments which are parties to the Non-Intervention Agreement will take such steps as are necessary to confer upon the officers in command of the naval vessels engaged in naval observation the right, within the area laid down in paragraph 32 above:

(*a*) to verify the identity of any ship, having the right to fly the flag of any of the participating countries that may be thought to be proceeding towards any port in Spain or in the Spanish Dependencies; and for this purpose, when necessary, to order such ships to stop, to board them and to examine their certificates of registry and clearance documents, and to ascertain whether there are Observing Officers on board;

(*b*) to ascertain whether the ship has called at one of the Observation Ports enumerated in paragraph 12 above, and has taken on board Observing Officers, or has been furnished with a document by the Administrator or Deputy Administrator in charge of an Observation Port, certifying that the vessel had called at the port in accordance with paragraph 20 (*c*) above;

(*c*) if and when a special plan has been submitted to, and approved by, the International Committee, to establish focal areas in the approaches to each zone, and to require all ships having the right to fly the flag of any of the participating countries to pass through the areas so established, when entering the zone.

38. No right of search will be accorded to the naval vessels engaged in naval observation, but whenever a ship fails to comply with the instructions of a naval vessel engaged in naval observation, given in accordance with the provisions laid down in paragraph 37 above, or whenever the officer in command of a naval vessel ascertains that the master of a

ship has not complied with the procedure laid down in paragraph 12 above, or has improperly flown the special pennant referred to in paragraph 33 above, he will draw the attention of the master to his obligations under the Non-Intervention Agreement to which the Government of his country is a party, and will point out that he would therefore be committing an offence against the laws of his own country unless he submits to observation before reaching a Spanish port. Non-compliance by a particular ship with the procedure here laid down will be regarded as *prima facie* evidence that the ship has committeed a breach of the Non-Intervention Agreement, and will entail the consequences indicated in paragraph 39 below.

39. In the circumstances outlined in paragraph 38 above, the officer in command of the naval vessels will submit a report to his Government, so that that Government may report the matter both to the International Committee and to the Government of the country to which the vessel in question belongs, in order that legal proceedings can be taken in the courts of that country. Any necessary evidence of the officers or crew of the naval vessel or of the Administrators and Deputy Administrators or their subordinate staff will, wherever possible, be taken upon commission in the method prescribed in the country concerned, in order to avoid the necessity of these witnesses having to proceed to the country in which the trial takes place.

Reports to be submitted by participating Governments in certain cases.

40. In the event of the master of any ship having the right to fly the flag of any of the countries which are parties to the Non-Intervention Agreement, being detected by a naval vessel engaged in naval observation, while attempting to commit a breach of the Non-Intervention Agreement in the manner indicated in paragraph 39 above, the Government of the country in which the ship so detected is registered will submit a full report to the International Committee regarding the circumstances of the case and, later, regarding the legal or other penalties inflicted upon the owner or master of the ship in question as the case may be.

V. THE INTERNATIONAL STAFF REQUIRED FOR THE OBSERVATION SCHEME

41. One of the most difficult tasks in the course of the preparation of the observation scheme has been to decide the number of international officials whom it will be necessary to employ to ensure the efficient operation of the scheme.

42. In this task careful consideration has been given to estimates which have been prepared by Technical Advisory Sub-Committees composed of experts nominated by the Representatives of those countries which are members of the Chairman's Sub-Committee of the International Committee. These estimates have been accepted as the most reliable which in existing circumstances it is possible to obtain. Nevertheless, it is impossible at this stage to determine with certainty how many officials will be required for the proper discharge of each part of the scheme. The arrangements which have been agreed upon for the staffing of this organisation must thus be regarded as tentative only, and as liable to revision in one direction or another in the light of experience gained in the actual operation of the scheme.

43. It is an essential feature of the scheme that it will be brought into operation in a series of stages.

44. The first stage will begin when the Chief Administrators, Administrators and Deputy Administrators and their personal staffs have been appointed and have taken up their respective posts. These officials will at once enter into the closest relations with the national officials of the countries in which they are stationed and will make all arrangements necessary to bring the next stage into operation. In this same period arrangements will be made for the recruitment of the subordinate officials who will be required.

45. The second stage will begin when a sufficient number of subordinate officials have been recruited and despatched to their posts, to enable the supervision scheme to be brought into operation on a skeleton basis. During this stage, it is envisaged that the Board will exercise their discretion as to the interim arrangements necessary until it is possible to bring the full scheme into operation.

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46. The third and final stage will be reached when the full complement of officials for each branch of the scheme has been recruited and they have been despatched to their posts.

47. It is anticipated that considerable practical experience regarding the number of officials required for each part of the scheme will have been gained during the period in which the scheme will have been in operation on a skeleton basis. It has been agreed, therefore, that at the end of the second stage referred to in paragraph 45 above the officers in charge of the main divisions of the scheme should be instructed to prepare for submission to the Board interim reports describing the working of the portions of the scheme for which they are severally responsible, and setting out their recommendations in regard to staff requirements.

48. If either of the Chief Administrators or the Administrator at Gibraltar is of the opinion that, even with the full staff provided in the scheme now agreed upon, he would not have at his disposal a sufficient number of officials for the proper discharge of his duties, the International Committee will take such steps as may be found, on examination, to be necessary to ensure the efficient operation of the portion of the scheme in question.

49. In the light of the foregoing considerations, it has been agreed to recruit the staffs shown below for each of the principal portions of the Scheme.

(*a*) *For the Franco-Spanish frontier.*
130 Observing Officers and Assistant Observing Officers.

(*b*) *For the Gibraltar-Spanish frontier.*
5 Observing Officers and Assistant Observing Officers.

(*c*) *For the sea observation scheme.*
550 Observing Officers and Assistant Observing Officers.

50. The figures given above are in each case exclusive of the Chief Administrators, Administrators, and Deputy Administrators, and their personal and administrative staffs.

VI. THE COST OF THE SCHEME

The cost of the schemes of land and sea observation.

51. The cost of the scheme as set out in Chapters II and III of the present Annex is estimated at £834,000 if it were to continue in operation for a full period of twelve months.[1]

Establishment of an International Fund.

52. In order to provide the funds required, it has been agreed to establish an International Fund to which the several Governments will contribute on agreed scales.

The administration of the International Fund.

53. The International Fund established in accordance with paragraph 52 above will be administered by the Board.

The cost of the scheme of naval observation.

54. Each of the Naval Powers participating in the scheme of naval observation (paragraphs 23 to 40 above) will defray the cost of observation which it has itself agreed to undertake.

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[1] His Majesty's Government in the United Kingdom have made themselves directly responsible for the payment of 80 per cent. of the cost of the special arrangements in Portugal, the remaining 20 per cent. being paid by the Portuguese Government themselves. This liability is estimated at £64,000, and a corresponding adjustment of the percentages will be made to ensure a fair distribution of financial liabilities. This adjustment will not entail any changes in the sums paid to the International Fund by the respective Governments, except in the case of His Majesty's Government in the United Kingdom.

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